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ARTICLES

MONTANA'S CONSTITUTIONAL ENVIRONMENTAL QUALITY PROVISIONS: SELF-EXECUTION OR SELF-DELUSION?

John L. Horwich*

I. INTRODUCTION

Noted public land law scholar Charles Wilkinson described Montana's 1972 Constitution as "the single strongest statement of conservation philosophy in the constitution of any state and, very likely, of any nation in the world."¹ But, are the state of Montana and its citizens better off for having raised environmental quality to constitutional status? Does a strong statement of conservation philosophy in the state constitution have any impact on the executive, legislative or judicial branches of government, or on the rights and obligations of individual citizens?

Montanans ratified their new constitution in 1972, at the dawn of the "environmental decade," and at a time of relative economic prosperity, which followed a century of massive mining and logging. It was natural that the new constitution should reflect a desire to protect Montana's physical environment.² The

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1. Charles Wilkinson, *Everything is Bound Fast by a Thousand Invisible Cords: The Future of the Conservation Community in the American West: Keynote Address to the Twenty-Ninth Montana Wilderness Association Convention*, WILD MONT. (Montana Wilderness Assoc., Helena, MT.), Mar. 1988, at 6; see also Grant D. Parker, *Montana's Nondegradation Laws: Will We Allow Continued Degradation of Montana's Waters? Response to Horwich's Nondegradation Article: Protecting Montana's High Quality Waters from Degradation*, 14 PUB. LAND L. REV. 185, 186 (1993).

2. See Harry W. Fritz, *The 1972 Montana Constitution in a Contemporary Con-*

new constitution proclaimed that all persons have an inalienable right to a clean and healthful environment;³ it obligated the state and each person to maintain and improve that clean and healthful environment for present and future generations;⁴ and it pledged to protect the environment from degradation and unreasonable depletion.⁵

Since the new state constitution was adopted, commentators have argued that the environmental quality provisions in Montana's constitution establish legally enforceable rights and obligations.⁶ The analysis to date, however, has been incomplete. Most commentators argue that the environmental quality provisions in Montana's constitution create legally enforceable rights and obligations, but none of the commentators has offered much insight into exactly what the provisions mean.⁷ In contrast to the commentators, neither the actions of the Montana Legislature nor the decisions of the state supreme court since 1972 suggest these strong constitutional statements of conservation philosophy have much legal effect.⁸

Recent changes in Montana's legislature which threaten to reverse the trend of two decades of increasingly protective environmental laws focus renewed attention on the environmental quality provisions of Montana's constitution.⁹ Population growth

text, 51 MONT. L. REV. 270, 273-74 (1990); see also Stan Stephens, *Keynote Speech to the Law School Symposium on the 1972 Constitution*, 51 MONT. L. REV. 237, 240 (1990).

3. MONT. CONST. art. II, § 3.

4. MONT. CONST. art. IX, § 1(1).

5. MONT. CONST. art. IX, § 1(3).

6. See, e.g., Tammy Wyatt-Shaw, Comment, *The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: "They Mean Something,"* 15 PUB. LAND L. REV. 219 (1994); Deborah Beaumont Schmidt & Robert J. Thompson, *The Montana Constitution and the Right to a Clean and Healthful Environment*, 51 MONT. L. REV. 411 (1990); Carl W. Tobias & Daniel N. McLean, *Of Crabbed Interpretations and Frustrated Mandates: The Effect of Environmental Policy Acts on Pre-Existing Agency Authority*, 41 MONT. L. REV. 177 (1980); Daniel Kemmis, Comment, *Environmental Rights, The Montana Constitution: Taking New Rights Seriously*, 39 MONT. L. REV. 224 (1978).

7. See Wyatt-Shaw *supra* note 6, at 246-47; Kemmis *supra* note 6, at 233. As discussed *infra*, the issue of what these provisions mean is quite complex; however the failure to seriously contemplate the issue shortchanges the complexity of the inquiry into whether the provisions mean anything.

8. In a state trial court decision, *National Wildlife Fed'n v. Montana Dep't of State Lands*, No. CDV-92-486, at 12 (Dist. Ct. Sept. 1, 1994) (on file with the author), Judge Thomas C. Honzel concluded that the environmental proclamations in Montana's constitution are not mere hollow platitudes, but instead they really meant something. The case before Judge Honzel did not require that he expand on what the provisions actually meant.

9. See Charles S. Johnson, *Business, Industry Savor Successes in Legislature*, <https://scholarworks.umd.edu/mlr/vol57/iss2/6>

and persistent pressure for natural resource exploitation, especially hard rock mining,¹⁰ in the face of relaxed legislative environmental protections,¹¹ will force a constitutional confrontation. Similar trends in other states and in the U.S. Congress will place increasing pressure on the environmental provisions of other state constitutions.¹²

Montana is not alone in seeking the meaning of state constitutional environmental provisions. In the past two-and-a-half decades, numerous states have adopted entirely new constitutions containing environmental provisions,¹³ or they have amended their constitutions to add environmental provisions.¹⁴

MISSOULIAN, April 19, 1995, at D2; David Fenner, *Utility, Mining Industries Top Spending '95 Lobbyists*, BILLINGS GAZETTE, May 31, 1995, at B1; see, e.g., 1995 Mont. Laws Chs. 192 (allowing exemptions to cleanup requirements for chemical spills), Ch. 223 (exempting "emergency" and "limited access opportunity" timber sales from environmental impact statement requirements), Ch. 331 (exempting some state agency actions from requirements of the Montana Environmental Policy Act), Ch. 352 (adding consideration of private property rights to the purpose and policy of the Montana Environmental Policy Act), Ch. 471 (prohibiting certain state environmental rules from being more stringent than corresponding federal regulations), Ch. 497 (revising water quality standards to require economic and technologic feasibility), Ch. 539 (allowing for temporary weakening of water quality standards), Ch. 575 (requiring posting of a bond when an injunction is sought against mining, construction, timber and grazing activities), Ch. 582 (exempting certain activities from ground water discharge permit requirements). The environmental quality provisions of Montana's constitution are set forth *infra* notes 56-57, 59-60 and accompanying text.

10. Telephone Interview with Carol Ferguson, Montana Hard Rock Impact Board (Jan. 10, 1996) (stating there are currently five hard-rock mining proposals undergoing environmental review in Montana: the Noranda Montanore project in Lincoln and Sanders Counties; the Phelps Dodge-Canyon Resources 7-Up Pete Joint Venture in Lewis & Clark County; the Noranda-Crown Butte New World Mine in Park and Carbon Counties; the Stillwater Mine in Sweet Grass County; and the Asarco Mine in Sanders County. Several existing hard-rock mines are also undergoing the review process for their planned expansions).

11. See *supra* note 9 and accompanying text.

12. See John Skow, *Earth Day Blues*, TIME, Apr. 24, 1995, at 75 (noting the effectiveness of industry lobbyists on Republican Congressmen, evidenced by proposed gutting of the Clean Water Act and the Endangered Species Act); Michael Satchell et al, *A New Day for Earth Lovers*, U.S. NEWS & WORLD REP., Apr. 24, 1995, at 58 (noting the Republican environmental agenda, which includes "sharply curtail[ing] government" regulation, and repealing or rewriting major environmental laws and regulations).

13. See FLA. CONST. art. II, § 7 (effective Jan. 7, 1969); ILL. CONST. art. XI, §§ 1-2 (effective July 1, 1971); LA. CONST. art. IX, § 1 (effective Jan. 1, 1975); MICH. CONST. art. IV, § 52 (effective Jan. 1, 1964); MONT. CONST. art. II, § 3, art. IX, § 1 (effective July 1, 1973); N.C. CONST. art. XIV, § 5 (effective July 1, 1973); PA. CONST. art. I, § 27 (effective May 18, 1971); VA. CONST. art. XI, §§ 1-2 (effective July 1, 1971).

14. See HAW. CONST. art. IX, § 8, art. XI, §§ 1, 9 (effective Jan. 1, 1979); MASS. CONST. amend. art. XCVII (effective Nov. 7, 1972); N.M. CONST. art. XX, § 21 (effective Nov. 2, 1971); N.Y. CONST. art. XIV, §§ 4-5 (effective Jan. 1, 1970); R.I. CONST.

Time and again, state courts have limited the impact of these environmental provisions.¹⁵ State courts have repeatedly held these environmental provisions are not self-executing: the courts ruled that they create no new rights, impose no new obligations and establish no new limits on government or private action in the absence of state legislation implementing their terms.¹⁶ Those who believed state constitutional environmental provisions represented a watershed for environmental protection have been sorely disappointed.¹⁷

art. I, § 17 (effective Nov. 3, 1970).

15. Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 WM. & MARY L. REV. 823, 847 (1990) ("Despite the obvious importance of state constitutional law to the environmental area, the incorporation of environmental provisions into state constitutions has not brought about the anticipated results."); see also *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978) (holding unconstitutional an administrative commission's designation of environmentally unique areas as "areas of critical state concern," despite argument that commission was empowered by constitutional mandate to protect state's scenic beauty); *Oscoda Ch. of PBB Action Comm., Inc. v. Department of Natural Resources*, 268 N.W.2d 240, 246 (Mich. 1978) (holding that a constitutional provision for protection of environment does not empower court to decide least harmful method of disposing of contaminated cattle); *Payne v. Kassab*, 361 A.2d 263, 273 (Pa. 1976) (holding that the state, in widening a street which required taking river common property, did not breach its constitutional duties as trustee of the environment, because the state must balance the public interest in the environment with other public interests).

16. See *Robb v. Shockoe Slip Found.*, 324 S.E.2d 674 (Va. 1985); *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 592 (Pa. 1973) (holding that the construction of a large tower on the site of the Battle of Gettysburg cannot be enjoined based on constitutional provision to protect the environment and historic sites (art. 1, § 27), despite the court's recognition "that [a]rticle 1 is entitled 'Declaration of Rights' and all of the first twenty-six sections . . . must be read as limiting the powers of government to interfere with the rights provided therein."); see also *Illinois Pure Water Comm. v. Director of Pub. Health*, 470 N.E.2d 988, 992 (Ill. 1984) (holding that constitutional provision for protection of environment does not create a "fundamental right" to a healthful environment and does not subject challenged statutes to a higher level of scrutiny).

17. There is a growing body of national literature spawned by the inclusion of environmental provisions in state constitutions. See, e.g., Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333 (1993); Richard O. Brooks, *A Constitutional Right to a Healthful Environment*, 16 VT. L. REV. 1063 (1992); Bruce Ledewitz, *The Challenge of, and Judicial Response to, Environmental Provisions in State Constitutions*, 4 EMERGING ISSUES ST. CONST. L. 33 (1991); Richard J. Tobin, *Some Observations on the Use of State Constitutions to Protect the Environment*, 3 ENVTL. AFF. 473 (1974); Roland M. Frye, Jr., *Environmental Provisions in State Constitutions*, 5 ENVTL. L. REP. (ENVTL. L. INST.) 50028 (1975); A. E. Dick Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193 (1972); Mary Ellen Cusack, Comment, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 173 (1993); Robert A. McLaren, Comment, *Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation*, 12 U. HAW. L. REV. 123 (1989); Oliver A. Pollard, III, Note, *A Promise Unful-*

The issue of whether Montana's constitutional provisions are self-executing has not yet been presented to the Montana Supreme Court. The court has cited the environmental quality provisions in support of a holding in only a few cases; and it has yet to base a decision on these provisions.¹⁸ The issue in Montana is ripe for resolution. Soon the Montana Supreme Court will be forced to decide the meaning of Montana's constitutional environmental quality provisions.

Most of the writing to date about state constitutional environmental provisions,¹⁹ and most court decisions addressing these provisions,²⁰ employ traditional self-execution analysis. This approach is both stark and sterile. It is stark in that it implies a false dichotomy: the traditional self-execution analysis concludes that a constitutional provision is either judicially enforceable without legislative action (i.e., it is self-executing), or it is meaningless until the legislature acts to provide substance (i.e., it is non-self-executing). It is sterile in that it ignores the many potential roles that may be played by a state constitutional provision. When the issue is framed in terms of traditional self-execution, the parties chose sides between self-executing, judicially-enforceable rules on the one hand and meaningless platitudes on the other.

This Article is an effort to reach beyond traditional self-execution analysis in examining the environmental quality provisions in Montana's constitution.²¹ This effort begins, in Part II, with an overview of Montana's constitutional environmental quality provisions, including a brief description of the back-

filled: *Environmental Provisions in State Constitutions and the Self-Execution Question*, 5 VA. J. NAT. RESOURCES L. 351 (1986).

18. See *infra* notes 236-37 and accompanying text.

19. See, e.g., Fernandez, *supra* note 17; Kemmis, *supra* note 6; McLaren, *supra* note 17; Pollard, *supra* note 17; Tobias & McLean, *supra* note 6; Wyatt-Shaw, *supra* note 6.

20. See, e.g., *United Artists' Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612, 620 (Pa. 1993) (holding that legislation was consistent with non-self-executing constitutional provision and allowed taking without compensation); *Shockoe Slip Found.*, 324 S.E.2d at 682-83 (holding provision was not self-executing and reversing the lower court's interpretation that the provision's policy limited state projects); *National Gettysburg Battlefield*, 311 A.2d at 592-95.

21. Alas, this Article does not proclaim once and for all what Montana's constitutional environmental quality provisions mean. That would most certainly be a worthy topic for one (or several) additional articles. It is my hope, however, that this article will contribute to framing that discussion so that it reflects an appreciation for the many shades of constitutional "meaning." I also hope this article will encourage those who are charged with drafting constitutional amendments to ponder the nuances of their task.

ground of the constitutional convention and citizen ratification. Part III identifies principles for interpreting constitutional environmental provisions. It includes a critique of the commentary which suggests state constitutional environmental provisions are either self-executing, judicially enforceable standards, or they are hollow, meaningless platitudes. Part III concludes by describing the many different functions state constitutional provisions may serve. Part IV examines Montana's constitutional environmental quality provisions in light of these different functions. Part V concludes with some observations on where this interpretation of these provisions leaves the Montana Legislature, the Montana judiciary and the citizens of the state.

II. MONTANA'S CONSTITUTIONAL ENVIRONMENTAL QUALITY PROVISIONS

A. *The Background of Montana's Environmental Quality Provisions*

The environmental quality provisions of Montana's constitution were included as part of a new constitution adopted by the voters of the state on June 6, 1972.²² That constitution, and the environmental quality provisions in particular, were products of their legal and political times.

Until the 1970's, the federal constitution was the "primary and dominant source of constitutional rights and liberties, with state constitutional law playing at most only an occasional and marginal role."²³ Since the 1970's, the federal constitution has been read as establishing a "floor" of constitutional protections,²⁴ rather than a limit. States may distinguish themselves through their state constitutions. States are free to create rights that go beyond the minimum standards of the federal constitution, and state courts may interpret rights established under state constitutions more broadly than their federal counterparts.²⁵

22. For background on the 1972 Constitution, see *Constitutional Symposium '89*, 51 MONT. L. REV. 235 (1990). The history of the environmental provisions in particular is recounted in two articles in the that issue. See Beaumont Schmidt & Thompson, *supra* note 6.

23. Peter R. Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 13, 16 (1988).

24. *Id.*

25. *State v. Bullock*, 272 Mont. 361, 378-85, 901 P.2d 61, 72-76 (1995) (holding that Montana will not "march lock-step" with the U.S. Supreme Court and, based on

Montana's 1972 Constitution was adopted at the outset of the "environmental decade" of the 1970's. Public distrust of the federal government and big business was high following the Vietnam War.²⁶ A century of deference to economic development—industrialization in the East and Midwest, mining and logging in the West—had brought financial prosperity, but at substantial ecological cost.²⁷ Congress passed the National Environmental Policy Act in late 1969,²⁸ and citizens took to the streets for the first Earth Day on April 22, 1970. Throughout the country, there was a new, broad-based interest in environmental protection and preservation. Economic prosperity and disengagement from a consuming foreign war primed Americans for a shift in priorities. Economic and military security no longer demanded unswerving sacrifice of environmental values. Population and industrial growth since World War II had taken its toll on the quality of life. Smoggy cities,²⁹ rivers that caught fire,³⁰ and pesticides that threatened the eradication of species,³¹ coalesced to ignite public support for a redirection of public priorities.

Those seeking to redirect public priorities to accord more weight to environmental considerations moved forward on several fronts. Environmentalism had become so popular that Democrats and Republicans fell over each other in the rush to pass the National Environmental Policy Act in late 1969.³² Congress was urged to expand the role of the federal government in pollution control. Before 1970, the federal role in water and air pollution had largely been to fund research and to encourage and finance the development of state programs.³³ However, in the

the Montana Constitution, which grants a greater right to privacy than that granted by the U.S. Constitution); *Cooper v. California*, 386 U.S. 58, 62 (1967) (stating that states are free to restrict police activity more than the U.S. Constitution requires). See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (noting the trend by which state courts construe their constitutions to guarantee more protection than U.S. Constitutional provisions).

26. See Stephens, *supra* note 2.

27. See Fritz, *supra* note 2, at 273-74.

28. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321-4370(d) (1994)).

29. See Betsy Carpenter, *The Suffocating Politics of Pollution*, U.S. NEWS & WORLD REP., June 20, 1994, at 69; 136 CONG. REC. S2,732-01, S2,737 (1990).

30. See Michael Satchell et al., *A New Day for Earth Lovers*, U.S. NEWS & WORLD REP., April 24, 1995, at 2; 141 CONG. REC. S2,744-01 (daily ed. Dec. 18, 1995).

31. See RACHEL CARSON, *SILENT SPRING* 118-22 (1962).

32. See Bob Benenson, *A Mature "Green" America Spawns Grass-Roots Anti-Regulatory Rebellion*, CONG. Q. WKLY. REP., June 19, 1995, at 1695.

33. See John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54

first two years of the decade, citizen concern with the environment and dissatisfaction with the pace of state programs led to Congressional passage of the Federal Clean Air Act of 1970³⁴ and the Federal Water Pollution Control Act of 1972.³⁵ Later in the decade, Congress passed the Resource Conservation and Recovery Act of 1976,³⁶ and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.³⁷ Each of these laws placed the federal government in the lead role in environmental protection, with states delegated the task of implementing the federal mandates.

Seeking to elevate environmental rights to constitutional status, advocates pushed for an amendment to the federal constitution adding environmental rights.³⁸ Unsuccessful in that endeavor, advocates urged the federal courts to interpret the federal constitution to include environmental rights. That effort failed also.³⁹

Along with federal efforts, environmental advocates engaged in similar endeavors at the state level. State legislatures passed mini-NEPAs, subjecting state actions to environmental scrutiny,⁴⁰ and they passed state air, water and solid waste laws implementing, and sometimes exceeding, the federal mandates.⁴¹

MD. L. REV. 1183, 1190-91 & n.27 (1995); CELIA CAMPBELL-MOHN ET AL., SUSTAINABLE ENVIRONMENTAL LAW § 1.2 (1993).

34. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7671(q) (1994)); see also CAMPBELL-MOHN ET AL., *supra* note 33.

35. Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (1994)); see also FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 3.03(1)(a), at 72 (1994).

36. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6992(k) (1994)).

37. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1994)).

38. See Brooks, *supra* note 17, at 1068; Tobin, *supra* note 17, at 473; Howard, *supra* note 17, at 194.

39. *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 536 (S.D. Tex. 1972) (proclaiming the lack of environmental protection in the U.S. Constitution); Brooks, *supra* note 17, at 1069; Tobin, *supra* note 17, at 473-74; Howard, *supra* note 17, at 194-95.

40. See, e.g., California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21178.1 (as amended 1995); Montana Environmental Policy Act, MONT. CODE ANN. §§ 75-1-101 to -324 (as amended 1995); Washington State Environmental Policy Act, WASH. REV. CODE ANN. §§ 43.21C to 43.21C.914 (1996 Supp.). For a comprehensive discussion of "mini-NEPAs," see Jeffrey T. Renz, *The Coming of Age of State Environmental Policy Acts*, 5 PUB. LAND L. REV. 31 (1984).

41. See, e.g., ALA. CODE § 22-28-1 to -23 (1990); ALASKA STAT. § 29.35.055 (1992 & 1995 Supp.); IND. CODE ANN. § 13-1-1-1 to 13-1-16-7 (West 1995); 35 PA. CONS. STAT. ANN. §§ 4001-4015 (West 1993 & 1995 Supp.); MONT. CODE ANN. § 75-1-201 to -207 (1995); N.M. STAT. ANN. §§ 74-6-1 to -17, 74-9-1 to -42 (Michie 1978 & 1995

Environmental advocates at the state level also sought constitutional status for environmental rights and obligations.⁴² This time they met with more success. During the late 1960's and early 1970's, eight states adopted entirely new constitutions containing environmental provisions,⁴³ and five states amended their constitutions to add environmental provisions.⁴⁴

Well before the Montana constitutional convention convened, environmental quality was identified as an issue to be addressed by the convention delegates.⁴⁵ The League of Women Voters called for a revised constitution that would ensure environmental protection,⁴⁶ and the Montana Constitutional Convention Commission identified the citizen's right to a healthful environment as a priority issue for the delegates.⁴⁷

At the convention itself, delegates introduced numerous proposals to address environmental issues.⁴⁸ After lengthy debate by the Committee on Natural Resources and Agriculture, proposed provisions were forwarded for consideration by the entire convention. Following spirited floor debate, the environmental provisions in Articles II and IX were included in the draft constitution proposed to the voters of the state.⁴⁹

While more than half the voters casting ballots on the new constitution voted for approval, the new constitution was rejected in forty-four out of fifty-six counties in the state, and fewer than half the citizens voting in the election actually voted in favor of the new constitution (because some voters voted only on compan-

Supp.); S.D. CODIFIED LAWS ANN. § 34A-2-1 to -124, 34A-6-1 to -105 (Michie 1992 & 1995 Supp.).

42. Butler, *supra* note 15.

The elevation of environmental quality to constitutional stature could have far-reaching consequences. Because the federal Constitution has no equivalent environmental provision, state constitutions offer great potential in the area of environmental law. State courts will not have to concern themselves with parallel federal law in interpreting environmental provisions in their constitutions. To many, state constitutional law offers a more acceptable approach to recognizing the fundamental importance of environmental values.

Id. at 846.

43. See *supra* note 13.

44. See *supra* note 14.

45. Beaumont Schmidt & Thompson, *supra* note 6, at 414.

46. LEAGUE OF WOMEN VOTERS OF MONTANA, A BETTER CONSTITUTION FOR BETTER GOVERNMENT 5 (1969).

47. MONTANA CONSTITUTIONAL CONVENTION COMM'N, STUDY NO. 10—BILL OF RIGHTS 250 (1971).

48. See generally Delegate Proposals, reprinted in I MONTANA CONSTITUTIONAL CONVENTION, 75-332 (1972) [twelve-volume set hereinafter TRANSCRIPTS].

49. See e.g. IV-V TRANSCRIPTS, *supra* note 48, at 1202-50.

ion issues, but not on adoption of the constitution).⁵⁰ The election narrowly survived a legal challenge.⁵¹ When the dust settled, Montanans found themselves with a new constitution, which included environmental provisions unlike those found in any other constitution.

B. The Environmental Quality Provisions

When Montanans ratified their new constitution, it contained provisions touted as establishing the strongest environmental protections of any state constitution at the time.⁵² Indeed, the new constitution proclaimed that all persons have an inalienable right to a clean and healthful environment, just as they have inalienable rights to pursue life's basic necessities.⁵³ Further, the new constitution added an entire article dedicated to the environment and natural resources.⁵⁴

The environmental provisions in the 1972 Constitution fall into two broad categories: those addressing a standard of quality for the natural environment, and those addressing particular issues of environmental management. The focus of this Article is on the provisions which address a standard of quality. Supporters argue that those provisions establish immutable standards which must be respected by the legislature and government agencies.⁵⁵ Yet it is also those provisions the meaning of which is unclear. The environmental management provisions are significant in their own right, but their application is specific and there is far less uncertainty over their meaning.⁵⁶

50. See Stephens, *supra* note 2, at 238.

51. In a 3-2 decision, the Montana Supreme Court upheld the validity of the election approving the new constitution. *State ex rel. Cashmore v. Anderson*, 160 Mont. 175, 500 P.2d 921 (1972).

52. Charles McNeil, a constitutional convention delegate, and member of the committee which drafted the environmental provisions, told the convention that the provisions comprised "the strongest constitutional environmental section of any existing state constitution." IV TRANSCRIPTS, *supra* note 48, at 1200.

53. MONT. CONST. art. II, § 3.

54. MONT. CONST. art. IX.

55. See *e.g.*, Wyatt-Shaw *supra* note 6, at 239; Tobias & McLean *supra* note 6, at 263; Kemmis *supra* note 6, at 233.

56. The provisions characterized as "environmental management provisions" all appear in Article IX of the Montana Constitution:

SECTION 2. RECLAMATION.

....
(2) The legislature shall provide for a fund, to be known as the resource indemnity trust of the state of Montana, to be funded by such taxes on the extraction of natural resources as the legislature may from time to

The environmental quality provisions consist of the environmental right set forth in Section 3, Article II, and Section 1 and the first subsection of Section 2, Article IX. The personal environmental right is included with all other inalienable rights:

Inalienable rights. All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.⁵⁷

Five other states include a similar right in their constitutions.⁵⁸

Section 1 of Article IX addresses the broad subject of environmental protection and improvement:

SECTION 1. PROTECTION AND IMPROVEMENT. (1) The state and

time impose for that purpose.

(3) The principal of the resource indemnity trust shall forever remain inviolate in an amount of one hundred million dollars (\$100,000,000), guaranteed by the state against loss or diversion.

SECTION 3. WATER RIGHTS. (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.

(2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.

(3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

(4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

SECTION 4. CULTURAL RESOURCES. The legislature shall provide for the identification, acquisition, restoration, enhancement, preservation, and administration of scenic, historic, archeologic [sic], scientific, cultural, and recreational areas, sites, records and objects, and for their use and enjoyment by the people.

SECTION 5. SEVERANCE TAX ON COAL—TRUST FUND. The legislature shall dedicate not less than one-fourth (1/4) of the coal severance tax to a trust fund, the interest and income from which may be appropriated. The principal of the trust shall forever remain inviolate unless appropriated by vote of three-fourths (3/4) of the members of each house of the legislature. After December 31, 1979, at least fifty percent (50%) of the severance tax shall be dedicated to the trust fund. (Section 5 as amended in 1976).

57. MONT. CONST. art. II, § 3.

58. HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, § 2; MASS. CONST. art. XLIX;

PENN. CONST. art. I, § 27; R.I. CONST. art. I, § 17.

each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.

(2) The legislature shall provide for the administration and enforcement of this duty.

(3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.⁵⁹

Subsection (1) of Section 2 of Article IX focuses on the environmental quality of lands disturbed by mining, logging or other removal of natural resources:

SECTION 2. RECLAMATION. (1) All lands disturbed by the taking of natural resources shall be reclaimed. The legislature shall provide effective requirements and standards for the reclamation of lands disturbed.⁶⁰

Each of these provisions contains language regarding environmental protection: maintaining and improving a clean and healthful environment, protecting against environmental degradation, preventing unreasonable depletion of natural resources and reclaiming lands disturbed by the extraction of natural resources. Between speaking the language and accomplishing the objectives, however, lies the murky territory of constitutional interpretation.

III. PRINCIPLES FOR INTERPRETING CONSTITUTIONAL ENVIRONMENTAL PROVISIONS

A. *The Inadequacy of Traditional Self-Execution Analysis*

Nearly every scholarly work and court decision analyzing state constitutional environmental provisions begins by considering whether the provision is self-executing.⁶¹ For most scholars and courts, the consideration of self-execution is also the end of the analysis.⁶² Unfortunately, the doctrine of self-execution has an alluring simplicity that masks the fine tones of constitutional interpretation behind a black and white facade.

59. MONT. CONST. art. IX, § 1.

60. MONT. CONST. art. IX, § 2(1).

61. See, e.g., Fernandez *supra* note 17; Cusack, *supra* note 17.

62. See Upper Big Blue Natural Resources Dist. v. City of Fremont, 495 N.W.2d 23 (Neb. 1993); Borough of Moosic v. Penn. Public Utility Comm., 429 A.2d 1237 (Pa. Commw. Ct. 1981); Robb v. Shockoe Slip Found., 324 S.E. 2d 674 (Va. 1985); Beaumont Schmidt & Thompson, *supra* note 6; Wyatt-Shaw, *supra* note 6.

1. Traditional Self-Execution Analysis

A constitutional provision is generally considered self-executing if the judiciary can enforce the provision without the aid of a legislative enactment.⁶³ Thus, a self-executing provision establishes judicially enforceable rights and obligations, even though the legislature has not enacted implementing legislation.⁶⁴ Courts and commentators have identified several types of constitutional provisions which are usually considered self-executing: provisions which expressly declare themselves to be self-executing,⁶⁵ provisions in bills of rights,⁶⁶ provisions which merely reaffirm common law,⁶⁷ provisions which specifically prohibit particular conduct,⁶⁸ and provisions which on their face establish an enforceable rule.⁶⁹ On the other hand, under traditional self-execution analysis, non-self-executing provisions lie dormant until given legal effect by the legislature; these provisions are meaningless until the legislature acts.⁷⁰ Thus, the doctrine of self-execution creates a dichotomy between self-executing and

63. BLACK'S LAW DICTIONARY 1360 (6th ed. 1990); 16 C.J.S. *Constitutional Law* § 46 (1984); FRANK P. GRAD, *THE DRAFTING OF STATE CONSTITUTIONS: WORKING PAPERS FOR A MANUAL* § 2, at 15 (1967) [hereinafter GRAD, *WORKING PAPERS*]. To be self-executing, the constitutional language must supply "a sufficient rule by means of which the right which [the provision] grants may be enjoyed and protected . . . without the aid of a legislative enactment." *State ex rel. City of Fulton v. Smith*, 194 S.W.2d 302, 304 (Mo. 1946) (quoting 11 AM. JUR. *Constitutional Law* § 74, at 691-92 (1937)); *State ex rel. Stafford v. Fox-Great Falls Theater Corp.*, 114 Mont. 52, 74, 132 P.2d 689, 700 (1942). This section is not intended as an exhaustive description of the theory of self-execution. For a summary of the origins and development of the doctrine of self-execution, see Fernandez *supra* note 17, at 335-41.

64. 1 THOMAS M. COOLEY, LL.D., *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 167-71 (Walter Carrington ed., 8th ed. 1927) [hereinafter COOLEY]; see also *Allstate Ins. Co. v. City of Billings*, 239 Mont. 321, 325, 780 P.2d 186, 188 (1989) (holding art. II, § 9, Montana's constitutional "Right to Know" provision, self-executing).

65. See, e.g., VA. CONST. art. I, § 8 ("The provisions of this section shall be self-executing."); see GRAD, *WORKING PAPERS*, *supra* note 63, § 2, at 21.

66. *Robb*, 324 S.E.2d at 676; GRAD, *WORKING PAPERS*, *supra* note 63, § 2, at 16.

67. *Robb*, 324 S.E.2d at 676.

68. Fernandez, *supra* note 17, at 342; GRAD, *WORKING PAPERS*, *supra* note 63, § 2, at 16.

69. For example, Section 9 of Article V of the Montana Constitution is self-executing: "No member of the legislature shall, during the term for which he shall have been elected, be appointed to any civil office under the state . . ." The constitutional language establishes a clear and complete rule that the court may enforce. The provision neither contemplates nor requires legislative action.

70. COOLEY, *supra* note 64, at 165; see also GRAD, *WORKING PAPERS*, *supra* note 63, § 2, at 15.

meaningful provisions on the one hand, and non-self-executing and meaningless provisions on the other.

The theory of self-execution is best understood in the context of the two broad categories of provisions traditionally considered non-self-executing. The first type of constitutional provision traditionally considered *not* to be self-executing is one which mandates that the legislature pass laws on a subject. For example, Article VIII, Section 10 of the Montana Constitution provides: "The legislature shall by law limit debts of counties, cities, towns and all other local government entities." Likewise, Article XIII, Section 5 of the Montana Constitution provides: "The legislature shall enact liberal homestead and exemption laws." Unless and until the legislature enacts limits on municipal indebtedness or approves specific homestead and exemption laws, these provisions have no substance to be enforced. Without legislation implementing the constitutional mandate, action by a court would violate both the intention behind the provision and the constitutional obligation of separation of powers.

Courts and commentators agree that, although the constitutional language is mandatory ("the legislature *shall* . . ."), a court may not enforce the obligation against the legislature.⁷¹ A court order to the legislature to enact laws implementing the constitutional mandate would violate the constitutional principle of separation of powers.⁷² The only other "enforcement" option available to a court would be for the court to supply the missing substance; that is, the court could establish municipal debt limits or authorize specific homestead and exemption laws. Such a

71. COOLEY, *supra* note 64, at 165; GRAD, WORKING PAPERS, *supra* note 63, § 2, at 19, 25; see also *Fergus v. Marks*, 152 N.E. 557, 559 (Ill. 1926) (stating that the court is powerless to compel the legislature to obey the state constitutional mandate to reapportion every ten years).

72. See Article III, § 1 of the Montana Constitution which expressly commands a separation of powers:

SECTION 1. SEPARATION OF POWERS. The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

See also *Fergus*, 152 N.E. at 560 (holding that the court, "being debarred by the constitutional division of governmental functions," cannot compel the legislature to perform its constitutional duty to reapportion); *Kidd v. McCanless*, 292 S.W.2d 40, 44 (Tenn. 1956) (citing *State ex rel. Martin v. Zimmerman*, 23 N.W.2d 610, 612 (Wis. 1956) (predicting that a judicial attempt to force the legislature to reapportion would "destroy our constitutional equilibrium")); GRAD, WORKING PAPERS, *supra* note 63, § 2, at 19; *Fernandez*, *supra* note 17, at 344.

response, however, would run counter to the express intent of the drafters and adopters of the constitution that the legislature be delegated those tasks; and, again, such action by the court would be a clear usurpation of legislative authority in violation of the separation of powers.⁷³ Legislative inaction in such a case may frustrate the clear instruction in the constitution, but that frustration is the price to be paid for honoring the constitutional principle of separation of powers.⁷⁴

The second type of constitutional provision often considered *not* to be self-executing is a provision comprised of general or vague terms. For example, the Supreme Court of Missouri held that the clause in the Missouri Constitution granting juvenile jurisdiction to the magistrate courts was not self-executing, because the clause "furnishes no guide as to the extent magistrate courts shall exercise such jurisdiction."⁷⁵ When courts declare vague provisions not self-executing, their judicial restraint seems to be premised not so much on concern for the intent of the drafters or adopters,⁷⁶ as on respect for the separation of pow-

73. The issue contemplated here of judicial action in the face of an express delegation to the legislature to define the very substance of a right or obligation is to be distinguished from that of judicial action in response to constitutional provisions which are silent as to remedy. See discussion *infra* notes 123-128 and accompanying text.

Article XI, § 5 of the Montana Constitution anticipates the limits of judicial enforcement of a legislative mandate and provides an alternative to the typical stalemate resulting from legislative inaction:

SECTION 5. SELF-GOVERNMENT CHARTERS. (1) The legislature shall provide procedures permitting a local government unit or combination of units to frame, adopt, amend, revise, or abandon a self-government charter with the approval of a majority of those voting on the question. The procedures shall not require approval of a charter by a legislative body.

(2) If the legislature does not provide such procedures by July 1, 1975, they may be established by election either:

(a) Initiated by petition in the local government unit or combination of units; or

(b) Called by the governing body of the local government unit or combination of units.

(3) Charter provisions establishing executive, legislative, and administrative structure and organization are superior to statutory provisions.

74. See GRAD, WORKING PAPERS, *supra* note 63, § 2, at 19; see also *Fergus*, 152 N.E. at 559-60 (Ill. 1926); *Fox-Great Falls*, 114 Mont. at 79-80, 132 P.2d at 703.

75. *In re V*, 306 S.W.2d 461, 465 (Mo. 1957). The general principle as expressed by the court was: "[I]f the provision is so vague as not to admit of an understanding of its intended scope, it cannot be self-executing." *Id.* at 463; see also *Tuttle v. National Bank of the Republic*, 44 N.E. 984, 985 (Ill. 1896) (holding a provision of the Kansas Constitution non-self-executing because it was ambiguous).

76. Courts, however, often impute an intent on the part of the drafters and adopters that a vague provision not be self-executing. In holding the provision of the Kansas Constitution concerning the liability of corporate stockholders to be non-self-

ers. Since there is no express legislative mandate at issue, the question concerning these vague provisions is not whether the judiciary will order the legislature to act. Instead, the issue is whether the judiciary will accept the task of interpreting the vague terms. A decision that a particular provision is not self-executing because the terms are vague is based on the judicial recognition that certain subjects are within the legislative province.⁷⁷ Courts exercise judicial restraint in these instances, finding a provision non-self-executing when the constitutional language is too imprecise to establish an enforceable rule.⁷⁸ Finding that establishing the essential details of the rule is within the traditional province of the legislature, courts generally decline to supply the missing substance, preferring to postpone enforcement of the constitutional provision until the legislature supplies the missing pieces.⁷⁹

executing because of its ambiguity, the Illinois Supreme Court went on to note: "It is apparent from a consideration of the provision itself that legislation was contemplated and necessary to carry into effect and enable the remedy to be applied . . ." *Tuttle*, 44 N.E. at 985.

77. *Fernandez*, *supra* note 17, at 347; *see also* *Alsdorf v. Broward County*, 333 So. 2d 457, 458 (Fla. 1976); *Tuttle v. National Bank of the Republic*, 44 N.E. 984, 985 (Ill. 1896); *In re V*, 306 S.W.2d 461, 462 (Mo. 1957); *Scopes v. State*, 289 S.W. 363, 366 (Tenn. 1927). Although this discussion characterizes the basis for judicial restraint in these cases as respect for the separation of powers, the issue may be characterized as falling within the political question doctrine. *See Fernandez*, *supra* note 17, at 347; *Butler*, *supra* note 15, at 854-55 (1990); GRAD, WORKING PAPERS, *supra* note 63, § 2, at 19. The characterization seems of no consequence; in either event, the result is judicial deference to the legislature.

78. *See, e.g., Tuttle*, 44 N.E. at 985-86; *In re V*, 306 S.W.2d at 465; *National Gettysburg Battlefield*, 311 A.2d at 593.

79. The Virginia Supreme Court's decision in *Robb v. Shockoe Slip Found.*, 324 S.E.2d 674 (Va. 1985) is typical. The Virginia Constitution was amended in 1971 to add an environmental quality provision which declared in article XI, section 1, that:

it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.

The court held the provision is not self-executing. The court concluded that the language of the constitution invited crucial questions of both substance and procedure. For example, "is the policy of conserving historic sites absolute? If not, what facts or circumstances would justify an exception? Does the policy apply only to state-owned sites, or does it extend to privately-owned sites?" And the court concludes: "Such questions beg statutory definition, and we believe those who drafted and adopted the first section of Article IX recognized that fact." The court found further support for its conclusion in section 2 of article XI, which authorized the state legislature to "undertake the . . . protection of historical sites and buildings." *Id.* at 676-77; *see also In re V*, 306 S.W.2d at 465 ("[T]he meaning and intended scope of the provision in question is so indefinite as to render it impossible of execution without specific legislative definition."); *National Gettysburg Battlefield*, 311 A.2d at 595.

2. *Deficiencies in Traditional Self-Execution Analysis*

The doctrine of self-execution as customarily employed has an alluring simplicity that tempts courts and commentators with seemingly easy solutions to difficult dilemmas. The rules for its application appear simple and straightforward. Unfortunately, the simplicity of traditional self-execution analysis comes at a price. First, in at least some of its applications, self-execution analysis is logically inconsistent. The lure of its simplicity has apparently caused some to overlook the inconsistency of its logic. Second, and even more significantly, the doctrine of self-execution fails to give due regard to the many potential roles that constitutional provisions may play. Constitutional provisions are not either judicially enforceable rules or meaningless statements awaiting legislative action. Those are only two of the many purposes served by constitutional provisions. Traditional self-execution analysis imprudently relegates non-self-executing provisions to window dressing, despite the fact that a body politic has affirmatively incorporated express language in its supreme governing document.

The logical inconsistencies of self-execution analysis are manifest in its application to vague provisions. The traditional definition that a constitutional provision is self-executing if the judiciary can enforce the provision without the aid of a legislative enactment is patently tautological when applied to vague provisions. Under this definition, self-execution rests in the eye of the judicial beholder. One court may characterize a provision as non-self-executing, thereby declining to enforce the provision until the legislature provides laws defining the vague terms.⁸⁰ A different court may accept the challenge to enforce the same provision by supplying on its own any interpretations necessary to give meaning to vague terms, thereby declaring that the provision is not dependent on legislation and thus is self-executing.⁸¹

80. See, e.g., *In re V*, 306 S.W.2d 461 at 465; *Tuttle v. National Bank*, 44 N.E. 984 at 985.

81. *Alsdorf v. Broward County*, 333 So. 2d 457 (Fla. 1976), reflects the alternative judicial viewpoints. The Broward County Circuit Court construed as non-self-executing, because of inherent vagueness, the Florida constitutional provision which prohibited counties from taxing property within municipalities for services rendered by the county exclusively for the benefit of property or residents in unincorporated areas. The circuit court considered the constitutional provision to be too vague to be workable. The court felt it was the legislature's duty to supply the standards and guidelines necessary to aid municipalities and counties in complying with the constitutional structures. *Id.* at 458. The Florida Supreme Court reversed, holding the provision self-executing. While acknowledging that the provision required substantial

The boundaries on what constitutes a "vague" provision are themselves unclear. Neither the cases nor commentaries provide meaningful criteria to assist a court in distinguishing vague provisions which are self-executing from those which are not.⁸² The cases disclose no reasonable basis to differentiate which ambiguities are appropriately resolved by the courts and which require legislative attention.⁸³ The absence of standards by which to distinguish vague constitutional provisions which are self-executing from those which are not certainly limits the usefulness of the doctrine, and indeed even casts doubt upon the viability of the entire concept. Yet the doctrine does seem to provide a handy refuge for a court seeking a way to avoid a sensitive issue.

Further evidence of logical inconsistency in self-execution analysis is seen in the different treatment accorded affirmative and negative characterizations of the same principle. Many courts relying upon traditional self-execution analysis would likely conclude that Article IX, Section 1(1) of Montana's Constitution is not self-executing: "The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Under the traditional analysis, the terms "clean and healthful environment," and perhaps even "maintain and improve," would be deemed so vague as to defy judicial construction. The analysis would impute from the vagueness of these terms a desire on the part of those adopting the provision for legislation to flesh out the substance.⁸⁴ In the exercise of judicial restraint, premised on the non-self-executing character of this provision, this analysis re-

judicial interpretation, the court found the mandate against city taxation for exclusive county activities absolute and unequivocal. *Id.* at 459. As a consequence, the Florida courts will have to draw the line between acceptable and prohibited municipal taxation. *Id.* at 460.

82. As discussed *supra* notes 74-78, in many instances the judicial reluctance to interpret and enforce vague provisions is based on the political question doctrine. In some cases, courts expressly rely on the political question doctrine. In many other cases, courts simply hold that the constitutional provision at issue is not self-executing, although the foundation for judicial restraint would more accurately be characterized as the political question doctrine. Much of the commentary in this article which critiques traditional self-execution analysis would apply also to the manner in which the political question doctrine is applied.

83. For example, reading three of the cases cited above, *Tuttle*, *In re V*, and *Alsdorf*, one would be hard pressed to identify any distinction in the constitutional provisions which would explain why two of the provisions are deemed non-self-executing because of their vagueness, while the other is not.

84. Fernandez, *supra* note 17, at 373.

quires courts to defer enforcing the terms until the legislature enacts laws establishing specific, concrete rules for guidance.

On the other hand, had the provision been written "The legislature shall pass no law restricting each citizen's right to a clean and healthful environment," the very syntax would demand a holding that the provision is self-executing. A court would have no choice but to define the vague terms. The court could not defer to the legislature to define the very limits that the constitution imposes on the legislature.

Accordingly, the nature of the provision as self-executing or not self-executing should not be based on the presence of "vague" terms. The effort of courts to avoid interpreting or enforcing constitutional provisions on the basis that vague terms make those provisions not self-executing does not withstand scrutiny.⁸⁵

Further, the doctrine of self-execution falsely dichotomizes constitutional provisions into those that are self-executing (and therefore meaningful) and those that are non-self-executing (and therefore meaningless). Although this strict dichotomy may not be inherent in self-execution analysis, it has become an integral component of self-execution analysis in practice. Courts generally consider a conclusion that a constitutional provision is not self-executing as the end of the matter — implying, if not expressing, that a non-self-executing provision is of no significance without legislative action.⁸⁶ This approach overlooks the many purposes of constitutional provisions beyond legislative mandates and judicially enforceable rules.

B. The Rich Texture of the Constitutional Fabric

State constitutional provisions may serve any one of several functions, only two of which—legislative mandates and judicially enforceable rules—are considered in traditional self-execution analysis. The role a particular constitutional provision plays may be analyzed in the context of respect for the intent of the framers and adopters and respect for the separation of powers.

85. See Fernandez, *supra* note 17, at 373-74.

86. See *supra* note 70.

1. The Overarching Principles of Intent and Separation of Powers

Two of the overarching principles which underlie the interpretation of federal and state constitutional provisions are: (1) a fundamental purpose of constitutional interpretation is to give effect to the intent of those who drafted and adopted the provision,⁸⁷ and (2) respect for the separation of powers among the branches of government.⁸⁸

The Montana Supreme Court has expressed its preference that the intent of the framers and adopters is first to be sought from the plain meaning of the words used.⁸⁹ Because constitu-

87. *People v. DeJonge*, 501 N.W.2d 127, 132 (Mich. 1993) (stating the rule that the constitution must be interpreted in light of the intent of its framers and ratifiers); see also William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188-89 (1824) (Marshall, C.J.); *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1844 (1995) (finding term limits inconsistent with framers' intent); *Firing v. Kephart*, 353 A.2d 833, 835 (Pa. 1976) (stating the rule that constitutional provision should be interpreted in terms of intent as understood by those adopting it); *Marshall, A Friend of the Constitution*, ALEXANDRIA GAZETTE, July 2, 1819, reprinted in JOHN MARSHALL'S DEFENSE OF MCCOLLOCH V. MARYLAND, 155, 167 (G. Gunther ed. 1969) ("[T]he great duty of a judge who construes an instrument is to find the intention of its makers."); cf. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816) (Story, J.).

The Montana Supreme Court adheres to the widely accepted tenet that a fundamental purpose of constitutional interpretation is to give effect to the intent of the framers and of the people who adopted the provision. The court also respects the constitutional mandate of separation of powers. See *General Agric. Corp. v. Moore*, 166 Mont. 510, 517-18, 534 P.2d 859, 863-64 (1975); *Butte-Silver Bow Local Govt. v. State*, 235 Mont. 398, 768 P.2d 327, 330 (1989).

88. See *United States v. Nixon*, 418 U.S. 683, 703-05 (1974); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-13, at 96 (2d ed. 1988); ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.6.7, at 163-64 (2d ed. 1994); GRAD, *WORKING PAPERS*, *supra* note 63, § 2, at 25-26. In Montana, the separation of powers is an express mandate in the constitution. See *supra* note 72; see also *State ex rel. Stafford v. Fox-Great Falls Theatre Corp.*, 114 Mont. 52, 80, 132 P.2d 689, 703 (1942).

89. In *Butte-Silver Bow Local Gov't*, the court concluded:

When interpreting a constitutional provision, certain tenets must be observed. The same rules of construction which apply to determining the meaning of statutory provisions apply to constitutional provisions. The intent of the framers of the provision is controlling. However, such intent shall first be determined from the plain meaning of the words used, if possible, and if the intent can be so determined, the courts may go no further and apply any other means of interpretation.

235 Mont. at 403, 768 P.2d at 330 (citations omitted) (quoting *Keller v. Smith*, 170 Mont. 399, 405, 553 P.2d 1002, 1006 (1976)); see also *Helena Elementary Sch. Dist. No. 1 v. State*, 236 Mont. 44, 52-53, 769 P.2d 684, 689 (1989).

The intent of those who framed and adopted the constitutional provision may be sought from three different sources: (1) the language of the document itself is a logical source to reveal the intent of those who drafted and voted to approve the

tional interpretation is, first and foremost, the interpretation of language, the court's preference seems sensible. If the language is clear and unambiguous, it seems unassailable to conclude the intent of the framers and those who voted to adopt the provision was as expressed in the language of the provision.⁹⁰ For example, the Montana Constitution provides: "The size of the legislature shall be provided by law, but the senate shall not have more than 50 or fewer than 40 members and the house shall not have more than 100 or fewer than 80 members."⁹¹ When such exact language is used, there is neither need nor justification for turning to contemporaneous commentary or historical context to assist in ascertaining meaning.

The language itself as the source of meaning has particular appeal in the constitutional context. First, the significance of a written constitution is not lost on those who have prepared the document. It is only appropriate to presume they have expressed themselves in careful and measured terms: they mean what they said and they said what they mean.⁹² Second, a constitution "derive[s] its force [not] from the convention which framed [it], but from the people who ratified it"⁹³ If the language employed is clear and unambiguous, it would be disingenuous to import a meaning different from that which would have been in the minds of the citizens who ratified the document.⁹⁴ When the

provision; (2) the intent may also be sought in the contemporaneous speeches, debates and writings of those involved in drafting and approving the constitutional provision; and (3) the intent may be sought by reference to the historical and political context surrounding adoption of the provision. See *People v. DeJonge*, 501 N.W.2d 127, 132 (Mich. 1993); David L. Abney, *Constitutional Interpretation: Moving Toward a Jurisprudence of Common Sense*, 67 TEMP. L. REV. 931, 931-33 (1994).

90. Professor Cooley noted:

[T]he first resort in all cases is to the natural significance of the words employed, in the order of grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning, apparent on the face of the instrument, is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add or take away from that meaning.

COOLEY, *supra* note 64, at 127 (quoting *Newell v. People ex rel. Phelps*, 7 N.Y. 9, 97 (1852) (Jonhson, J., concurring)).

91. MONT. CONST. art. V, § 2 (1889).

92. COOLEY, *supra* note 64, at 128-29.

93. *Id.* at 143.

94. Professor Cooley further commented:

[T]he intent to be arrived at is that of the people, and it is not to be sup-

language of a constitutional provision is clear and unambiguous, the Montana Supreme Court has declined to consider the transcript of the Constitutional Convention in interpreting the provision.⁹⁵

Even where the underlying purpose of the constitutional provision is apparent on its face, the Montana Supreme Court has steadfastly limited its interpretation to the precise words employed. In *State ex rel. Stafford v. Fox-Great Falls Theatre*,⁹⁶ the court confronted a constitutional provision addressing lotteries.⁹⁷ Although the constitutional provision left no doubt that its drafters and those who voted for the provision desired to outlaw lotteries in Montana, the court reaffirmed its obligation to interpret only the language employed in the provision.⁹⁸ Because that language did not itself outlaw lotteries, but instead mandated that the legislature do so (which it had not done), the court agreed with the defendant that its games of chance were not illegal.⁹⁹ The court stated: "The obvious meaning of the words cannot be ignored in order to obtain a short-cut, however

posed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.

Id.

95. *Helena Elementary Sch. Dist. No. 1 v. State*, 236 Mont. 44, 52-53, 769 P.2d at 689 (1989). This is not to suggest that a court need never look beyond the language of the document itself. Even as ardent a textualist as noted constitutional scholar and jurist Thomas M. Cooley conceded there is a time when one must go beyond the words themselves:

It is possible, however, that after we shall have made use of all the lights which the instrument itself affords, there may still be doubts to clear up and ambiguities to explain. Then, and only then, are we warranted in seeking elsewhere for aid. We are not to import difficulties into a constitution, by a consideration of extrinsic facts, when none appear upon its face. If, however, a difficulty really exists, which an examination of every part of the instrument does not enable us to remove, there are certain extrinsic aids which may be resorted to, and which are more or less satisfactory in the light they afford.

COOLEY, *supra* note 64, at 141; see also *Whitcom v. Young*, 279 N.E.2d 566, 574 (Ind. 1972) (use of extrinsic evidence only appropriate when constitutional language is ambiguous).

96. 114 Mont. 52, 132 P.2d 689 (1942).

97. The Montana Constitution provided: "The legislative assembly shall have no power to authorize lotteries, or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this state."

MONT. CONST. art. XIX, § 2 (1889).

98. *Stafford*, 114 Mont. at 72, 132 P.2d at 699.

99. *Id.* at 81, 132 P.2d at 704.

desirable the end."¹⁰⁰

Stafford also illustrates the Montana Supreme Court's respect for the separation of powers as a fundamental principle of constitutional interpretation.¹⁰¹ The legislature had not responded to the clear mandate in the constitution for legislation making lotteries illegal. In this action, the state asked the court to do what the legislature had failed to do: outlaw lotteries as desired by those who drafted and adopted the constitutional provision.¹⁰² Even though outlawing lotteries and similar games of chance is not a complicated matter, the court steadfastly refused to tread on turf clearly dedicated to the legislature.¹⁰³ "We agree, of course, that the constitutional purpose should be obeyed; but so should the more fundamental constitutional purpose that the legislative function be not usurped by the judicial branch."¹⁰⁴

Respect for the intent of those who drafted and adopted the constitutional provisions (with particular regard for the language employed) and respect for the separation of powers brings into focus the multiple potential roles these provisions may play. Contrary to the duality implicit in traditional self-execution analysis, constitutional provisions may serve many purposes.

2. *Explicit, Judicially-Enforceable Rules*

Many constitutional provisions establish clearly self-sufficient, judicially enforceable rules. The intent of the framers and adopters that these provisions constitute judicially enforceable rules is apparent from the language employed, and judicial enforcement of these rules does not require the court to exercise authority or discretion delegated to the legislative or executive branches.

One category of explicit, judicially enforceable rules consists of constitutional provisions that are present enactments, indistinguishable from typical legislation.¹⁰⁵ These provisions, com-

100. *Id.* at 72, 132 P.2d at 699.

101. *See id.* at 80, 132 P.2d at 703.

102. *See Stafford*, 114 Mont. at 73-74, 132 P.2d at 700.

103. *See id.* at 79-80, 132 P.2d at 703.

104. *Id.* at 80, 132 P.2d at 703. Of course, in this instance the constitutional provision at issue reflected more than one purpose. Clearly those who drafted and adopted the provision desired that lotteries be outlawed. Additionally, however, those who drafted and adopted the provision intended that the outlawing of lotteries be accomplished by legislative action.

105. *See Rice v. Howard*, 69 P. 77 (Cal. 1902). "[T]hese constitutional provisions

plete in themselves, are the epitome of "self-executing" constitutional enactments. For example, Article III, Section 2 of the Montana Constitution provides: "The seat of government shall be in Helena, except during periods of emergency resulting from disasters or enemy attack."¹⁰⁶ Similarly, Article VII, Section 10, provides: "Any holder of a judicial position forfeits that position by either filing for an elective public office other than a judicial position or absenting himself from the state for more than 60 consecutive days."¹⁰⁷ These provisions are as enforceable in the constitution as they would be in legislation. It is evident from the specificity of the language employed and the absence of any deferral to the legislature that these provisions were intended to be self-executing.

Another category of judicially enforceable rules consists of constitutional provisions explicitly limiting government powers. The federal and state constitutions yield numerous examples of provisions establishing explicit limits on government action. For example, Article II, Section 5 of the Montana Constitution provides: "The state shall make no law respecting the establishment of religion or prohibiting the free exercise thereof."¹⁰⁸ This type of "mandatory-prohibitory provision[]" may always be judicially enforced by declaring any contrary legislation unconstitutional.¹⁰⁹ The court may simply refuse to enforce any legislative act which runs afoul of the constitutional provision's strictures.¹¹⁰ It is unquestionable that those who drafted and approved such language expected and intended that the limit expressed would be enforced by the judiciary.¹¹¹

are but statutes, which the legislature cannot repeal or amend." *Id.* at 79.

106. MONT. CONST. art. III, § 2.

107. MONT. CONST. art. VII, § 10.

108. MONT. CONST. art. II, § 5.

109. Fernandez, *supra* note 17, at 342.

110. Identifying the provision as judicially enforceable without the need for implementing legislation is not to say interpretation of the meaning of the provision is simple. Although it may be apparent the framers of the document and those who approved it intended the strictures of the provision to be enforced without resort to legislation, the precise nature of those strictures may be less apparent.

111. Another example is the "open meetings" provision of the Montana Constitution. Article II, Section 9 states: "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."

In *In re Lacy*, 239 Mont. 321, 780 P.2d 186 (1989), the Montana Supreme Court held the provision to be self-executing. The court noted: "[T]here was no intent on the part of the drafters to require any legislative action in order to effectuate [the terms of this provision]." *Id.* at 325, 780 P.2d at 188.

3. Individual Rights

Individual rights constitute a recognized category of constitutional provisions. Although individual rights provisions¹¹² are generally considered self-executing,¹¹³ again there is a much more subtle analysis beneath the surface of the self-executing/non-self-executing dichotomy.

Individual rights provisions highlight the significant distinction that may exist between the substantive right and the judicial enforcement of that right.¹¹⁴ As eloquently argued by Professor Lawrence Gene Sager, the underlying substantive individual right is established by virtue of its inclusion in the constitution, even though other considerations may lead to the "underenforcement" of the right by the judiciary.¹¹⁵

For some individual rights, there is no gap between the substantive right and judicial enforcement of the right. These rights are a subset of the explicit, judicially enforceable rules previously discussed.¹¹⁶ Individual rights which are expressed as an explicit limit on government power are as judicially enforceable as other "mandatory-prohibitory" provisions.¹¹⁷ For example, the individual freedom of speech in the Montana Constitution is established, in part, by denying the state the authority to pass any law impairing the freedom of speech or expression.¹¹⁸ Notwithstanding that application of this limitation requires the judiciary to exercise discretion in defining what constitutes "impairing the freedom of speech or expression," the limit on government authority was effective upon adoption of the

112. See, e.g., MONT. CONST. art. II, § 3 (inalienable rights), § 4 (equal protection and freedom from discrimination), § 5 (freedom of religion), § 6 (freedom of assembly), and § 7 (freedom of speech, expression and press).

113. *Robb v. Shockoe Slip Found.*, 324 S.E.2d 674, 676 (Va. 1985) ("[C]onstitutional provisions in bills of rights . . . are usually considered self-executing."); GRAD, WORKING PAPERS, *supra* note 63, § 2, at 16. But see *National Gettysburg Battlefield*, 311 A.2d at 592.

114. The distinction may also be characterized as the difference between the meaning of a normative precept and the application of that precept. Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978) ("It is part of the intellectual fabric of constitutional law and its jurisprudence that there is an important distinction between a statement which describes an ideal which is embodied in the Constitution and a statement which attempts to translate such an ideal into a workable standard for the decision of concrete issues.")

115. *Id.* See discussion *infra* notes 122-136 and accompanying text.

116. See *supra* text accompanying notes 105-13.

117. See *supra* notes 108-13 and accompanying text.

118. "No law shall be passed impairing the freedom of speech or expression."

MONT. CONST. art. II, § 7.

constitution.¹¹⁹ The individual right is enforced by judicial action invalidating legislative or executive action which is counter to the constitutional stricture. Where the individual right is defined explicitly in the constitution as a limit on executive and legislative government authority, judicial enforcement of that right cannot be dependent on legislative or executive action.

For other individual rights, the connection between the substantive right and judicial enforcement of the right is more problematic.¹²⁰ In contrast to individual rights expressed as explicit limits on government authority, the constitution sometimes expresses personal rights as affirmative entitlements. For example, "The people shall have the right to peaceably assemble, petition for redress or peaceably protest governmental action,"¹²¹ and "The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures."¹²² Individual rights so expressed leave open not only questions about the substantive content of the right (e.g., what constitutes an "unreasonable" search?), but also questions about how the right is to be enforced (e.g., exclusion at trial of evidence obtained in an unreasonable search, or monetary damages against the government official responsible for the unreasonable search).¹²³

119. Fernandez, *supra* note 17, at 342; GRAD, WORKING PAPERS, *supra* note 63, § 2, at 16; see *Adams v. Maryland*, 347 U.S. 179, 181 (1954).

120. This topic itself is worthy of an entire article. I can only attempt here to raise the relevant issues and summarize the relevant considerations. For an excellent and complete treatment of this topic, see Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289 (1995).

121. MONT. CONST. art. II, § 6.

122. MONT. CONST. art. II, § 11.

123. This issue of enforcing affirmative individual rights came to the forefront in the U.S. Supreme Court case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Webster Bivens' apartment was subjected to a warrantless search; his family was threatened with arrest; he was handcuffed in front of his family; and he was interrogated, booked and subjected to a visual strip search. *Id.* at 389. Eventually, all charges against him were dropped. Since all charges were dropped, the usual remedy of excluding evidence seized in violation of the constitutional right against unreasonable searches and seizures was unavailable. Bivens sued the agents in federal district court seeking damages to compensate for the humiliation, embarrassment and mental suffering he incurred as a result of the agents' unlawful conduct. *Id.* at 389-90. The government argued that Bivens had no cause of action for damages based solely on the Constitution; and since Congress had not established a federal cause of action for damages arising from an unreasonable search or seizure, Bivens' only remedies would be as provided in state tort law. *Id.* at 390-91. The U.S. Supreme Court held that Bivens was entitled to sue for damages. *Id.* at 397. In *Bivens*, the Court recognized that the constitutional right to be free from unreasonable searches and seizures was enforceable by the judiciary without congressional action.

There is a substantial national debate concerning the appropriate role of the judiciary *vis' a vis'* the legislature in implementing constitutional affirmative rights provisions.¹²⁴ For present purposes, this Article emphasizes the distinction between individual rights expressed as explicit limits on government power and those expressed as affirmative rights. Further, this Article emphasizes the distinction between the substantive right and the enforcement of that right—a distinction that arises in connection with individual rights expressed as affirmative entitlements. Especially as to rights expressed as affirmative entitlements, it is imperative to appreciate the role that may be played by “underenforced constitutional norms.”¹²⁵

As described by Professor Sager, there are a number of reasons why the judiciary may not enforce a constitutional provision, especially an affirmative rights provision, to its conceptual limit. Courts may choose to refrain from enforcing an affirmative rights provision, or limit the enforcement of such a provision, for reasons of judicial economy,¹²⁶ judicial competence,¹²⁷ restraint founded on the political question doctrine,¹²⁸ or other similar concerns.¹²⁹ Professor Sager cites by way of example the limits which the U.S. Supreme Court has imposed on judicial enforcement of the right of equal protection under the federal Constitution.¹³⁰ The judicial construct of stratified review employing the “rational relationship test,” “compelling state interest test,” or an intermediate test somewhere between the two, serves to seriously restrict judicial enforcement of the principle of equal protection.¹³¹

However, it is a mistake to equate the judicially imposed limit of judicial enforcement with the legal scope of the right

the constitutional provision establishes the right, obligation or principle without legislative action. The *right* of persons to be free from unreasonable searches and seizures is established by the Constitution, without Congressional action. As illustrated in *Bivens*, the recognition of the right may be a far different matter from the remedies available for a violation of that right.

124. See Bandes, *supra* note 120 and caselaw and literature cited therein.

125. Sager, *supra* note 114, at 1213.

126. *Id.* at 1218.

127. *Id.* at 1217.

128. *Id.* at 1224-25.

129. Sager, *supra* note 114, at 1218.

130. *Id.* at 1215-18.

131. *Id.* For example, under the “rational relationship test” which is applied in most contexts, the level of judicial review “is tantamount to a reflexive validation of the challenged classification, because the ‘test’ incorporates a theory and practice of extreme deference to the judgment of the enacting official or body.” *Id.* at 1215.

itself.¹³² Unfortunately, at a time when litigation is sought as the elixir for all wrongs, it is difficult to overcome the notion that the substantive meaning of a constitutional right is coextensive with its judicial enforceability. But by limiting constitutional provisions in such a manner, we again view constitutions through glasses which obscure the fine shades of meaning.

Government officials, both executive and legislative, have a legal obligation to obey a constitutional norm, even if their action falls outside the scope of judicial enforcement.¹³³ Legislators and executive branch personnel take an oath and assume an obligation to uphold the state constitution. That obligation is not limited to the extent to which the judiciary has elected to enforce a given constitutional provision. By way of example, although the judiciary may refrain from interpreting or enforcing a constitutional clause on the grounds that applying the provision is a political question, that exercise of judicial restraint neither deprives the clause of all meaning, nor lifts from the legislature or executive branch the obligation to fulfill the constitutional mandate to the best of their ability.¹³⁴

4. *Legislative Authorizations*

Some constitutional provisions simply authorize legislation on a subject. For example, Article II, Section 35 of the Montana Constitution provides: "The people declare that Montana servicemen, servicewomen, and veterans may be given special considerations determined by the legislature." Likewise, Article XII, Section 1(2) provides: "Special levies may be made on livestock and on agricultural commodities for disease control and indemnification"

On the one hand, these provisions are self-sufficient in providing the legislative authority which they purport to provide. In some cases, for example the authorization for special consideration for veterans, these provisions are symbolic only, because they simply express an authority which was already inherent in state government.¹³⁵ As a government of reserved powers, the

132. *Id.* at 1213.

133. Sager, *supra* note 114, at 1227.

134. *See id.* at 1227.

135. Although it seems we sometimes forget the historic order of events, the federal government was created by the original states, and not vice versa. Cooley, *supra* note 64, at 9. The federal government has only those powers delegated to it by the states and citizens in the federal constitution. U.S. CONST. amend. X. As a government of enumerated powers, the federal government has authority only to the

state government already has the authority to legislate in all areas not delegated exclusively to the federal government or prohibited by federal constitutional guarantees.¹³⁶ Technically, these provisions are redundant—expressing an authority which the legislature inherently possesses.

In other cases, these provisions are designed to authorize legislation which might be prohibited by other constitutional provisions. For example, the authorization in Article XII, Section 1(2) for a special levy on livestock and agricultural commodities for special purposes was designed to overcome limitations that would otherwise prohibit such a tax.¹³⁷

In any case, it is clear the legislative authorizations are not intended to, nor do they on their own, create substantive rights or impose obligations on citizens or the state. Until the legislature approves legislation granting particular consideration to veterans, veterans are entitled to no special consideration merely by virtue of Article II, Section 35 of the Montana Constitution.¹³⁸

5. Integral Legislative Mandates

As discussed previously, one type of constitutional provision uniformly held to be non-self-executing is that which commands the legislature to enact laws on a subject.¹³⁹ Courts and commentators have agreed that despite mandatory constitutional language (e.g., "the legislature *shall* . . .") the obligation may not be enforced against the legislature.¹⁴⁰ As noted, judicial enforcement of the obligation directed to the legislature would

extent provided by the federal constitution. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). By contrast, state governments are governments of reserved powers; that is, they retain ("reserve") all authority which they have not delegated exclusively to the federal government in the federal constitution. U.S. CONST. amend. X. As a consequence, a state constitutional provision authorizing or directing the state legislature to legislate to protect the environment simply restates authority already inherent in the state legislature. Fernandez, *supra* note 17, at 344.

136. U.S. CONST. amend. X.

137. See V TRANSCRIPTS, *supra* note 48, at 1367.

138. These types of provisions which authorize, but do not command, the legislature to act are categorized as "non-mandatory" in the classification scheme adopted in 16 C.J.S. *Constitutional Law* §§ 46-48 (1984) and propounded by Fernandez, *supra* note 17, at 341-42. Non-mandatory provisions are never self-executing.

139. See *supra* notes 70-74 and accompanying text.

140. COOLEY, *supra* note 64, at 165; see e.g., *Fergus v. Marks*, 152 N.E. 557, 559 (1929) (stating the court is powerless to compel the legislature to obey the state constitutional mandate to reapportion every ten years); *Montana Stockgrowers Ass'n v. State*, 238 Mont. 113, 117, 777 P.2d 285, 288 (1989).

violate the constitutional principle of separation of powers.¹⁴¹

However, deference to the principle of separation of powers does not strip constitutional commands to the legislature of all meaning. These constitutional mandates still may perform important functions, which are often overlooked in traditional self-execution analysis. Legislative mandates establish parameters which must be respected by enacted legislation and they establish principles which may inform or guide the interpretation of other state action.¹⁴²

*Butte Community Union v. Lewis*¹⁴³ illustrates the manner in which enacted legislation must respect constitutional legislative mandates. Article XII, Section 3(3) of the Montana Constitution contained a legislative mandate:¹⁴⁴ "The legislature shall provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reason of age, infirmities, or misfortune may have need for the aid of society."¹⁴⁵ Thirteen years after the constitution was adopted, the legislature passed laws purporting to comply with the duty imposed by this section.¹⁴⁶ That legislation excluded certain able-bodied persons without dependent minor children from general relief assistance for basic necessities.¹⁴⁷ The 1985 legislation was overturned as violative of equal protection.¹⁴⁸

The legislature met in special session in June 1986 and revised the public assistance laws, but substantially retained the denial of general assistance relief for more than two months to all able-bodied persons without dependent minor children.¹⁴⁹ This time, the Montana Supreme Court focused its review not on equal protection grounds, but on the standards imposed by Article XII, Section 3(3).¹⁵⁰ Although the court recognized that the provision was not self-executing and "it needs the affirmative

141. MONT. CONST. art. III, § 1. See *supra* note 72 and accompanying text.

142. GRAD, WORKING PAPERS, *supra* note 63, § 2, at 20; Frank P. Grad, *The State Constitution: Its Function and Form For Our Time*, 54 VIRG. L. REV. 928, 964-66.

143. 229 Mont. 212, 745 P.2d 1128 (1987).

144. In reaction to *Butte Community Union*, the constitution was amended to alter Article XII, Section 3(3) from an integral legislative mandate to a legislative authorization. The clause now reads: "(3) The legislature may provide such economic assistance"

145. MONT. CONST. art. XII, § 3(3) (1972).

146. *Butte Community Union*, 229 Mont. at 213-14, 745 P.2d at 1129.

147. *Id.* at 214, 745 P.2d at 1129.

148. *Butte Community Union v. Lewis*, 219 Mont. 426, 434-35, 712 P.2d 1309, 1314 (1986).

149. *Butte Community Union*, 229 Mont. at 214, 745 P.2d at 1129.

150. *Id.* at 215-16, 745 P.2d at 1130.

action of the legislature to be given effect,"¹⁵¹ when the legislature did act it was bound to obey the duty expressed in the constitution.¹⁵²

Similarly, *McNair v. School District No. 1*¹⁵³ illustrates how a constitutional legislative mandate may inform or guide the interpretation of state action. In *McNair*, a taxpayer challenged the authority of a school district to issue and sell bonds to construct and equip an outdoor gymnasium and athletic field for the local high school.¹⁵⁴ Mr. McNair sought to enjoin the district's proposed issuance and sale of bonds because the statutes establishing the power and authority of local school district boards of trustees did not expressly include the authority to issue bonds for outdoor athletic facilities.¹⁵⁵ Although the literal statutory language did not extend to outdoor athletic facilities, the court looked to the educational provisions in the 1889 Constitution for guidance in interpreting the authority of local school districts.¹⁵⁶ The 1889 Constitution declared that: "It shall be the duty of the legislative assembly of Montana to establish and maintain a general, uniform and thorough system of public, free common schools."¹⁵⁷ The court concluded that a "thorough" system of education in the constitution "is not discharged by the mere training of the mind."¹⁵⁸ The constitutional mandate, although not an enforceable obligation against the legislature in the first instance, provided meaningful guidance in interpreting the authority of local school districts under state law.¹⁵⁹

151. *Id.*

152. *Id.* at 216, 745 P.2d at 1130; *see also* Fallon County v. State, 231 Mont. 443, 447, 753 P.2d 338, 340 (1988); McDonald v. State, 220 Mont. 519, 532, 722 P.2d 598, 606 (1986).

153. 87 Mont. 423, 288 P. 188 (1930).

154. *McNair*, 87 Mont. at 425, 288 P. at 189.

155. *Id.*

156. *Id.* at 427-28, 288 P. at 190.

157. MONT. CONST. art. XI, § 1 (1889).

158. *McNair*, 87 Mont. at 428, 288 P. at 190-92.

159. It may seem incongruous that a constitutional provision that may not be enforced in the first instance suddenly springs to life once the legislature acts within the subject of the constitutional mandate. The rationale for such a result seems to be twofold. First, judicial restraint founded upon separation of powers principles is to be as limited as possible; i.e., limited only to the extent the conflict between the constitutional doctrine of separation of powers and the constitutional mandate for legislation is irreconcilable. As noted above, this conflict arises from limitations inherent in the court's only remedies for a failure of the legislature to legislate when commanded by the constitution: the court cannot order the legislature to legislate and the court will not usurp the legislative function by legislating itself. By contrast, courts have never refused to strike down existing legislation as unconstitutional, and send the legislature back to the task of trying again. Thus, once the legislature has affirma-

6. *Supplementary Legislation*

Some constitutional clauses function to either authorize or mandate legislation supplementary to a primary constitutional provision. The Montana Constitution has only a few examples of these provisions, but Article V, Section 13 provides examples of both authorizing and mandating supplementary legislation. The first sentence of the section establishes a typical judicially enforceable rule: "The governor, executive officers, heads of state departments, judicial officers, and such other officers as may be provided by law are subject to impeachment, and upon conviction shall be removed from office."¹⁶⁰ The next sentence authorizes supplementary legislation: "Other proceedings for removal from public office for cause may be provided by law."¹⁶¹ The next subsection mandates supplementary legislation: "The legislature shall provide for the manner, procedure, and causes for impeachment"¹⁶²

Provisions authorizing or mandating supplementary legislation are interpreted the same as other directives to the legislature. Those that merely authorize legislation on a matter are either redundant, expressing an authority that already exists, or they authorize legislation which otherwise might be prohibited by other constitutional provisions. Those that command supplementary legislation, like other legislative mandates, are limited in their import by virtue of separation of powers concerns. However, they may serve the function of delimiting legislative power or of guiding the interpretation of other legislation or government acts, as is true for direct commands to the legislature.

These types of clauses are singled out for separate consideration because of the issue that often arises regarding the relationship between the clause authorizing or mandating legislation and the primary clause. The issue is whether the clause authorizing or mandating legislation is in fact integral or supplemen-

tively passed legislation, separation of powers concerns no longer inhibit the court's action.

Second, having overcome the separation of powers hurdle, the court then is prompted to act to preserve meaning in the constitution. If the legislature is free to enact legislation inconsistent with the constitution (simply because the court could not order the legislature to act in the first instance), the power to amend the constitution would be granted to the legislature, which it is not. *See, e.g., Butte Community Union*, 229 Mont. at 215, 745 P.2d at 1130.

160. MONT. CONST. art. V, § 13(1).

161. *Id.*

162. MONT. CONST. art. V, § 13(2).

tary to the primary clause. If the primary clause independently qualifies as an explicit, judicially enforceable rule, then the clause authorizing or mandating legislation is supplementary and the authorization or mandate for supplementary legislation will not detract from the meaning or enforceability of the primary constitutional provision.¹⁶³ On the other hand, if the substance of the primary clause depends on the authorized or mandated legislation, then the clause authorizing or mandating legislation is integral to the primary clause. And if the clause authorizing or mandating legislation is integral to the primary clause, then the function of the primary clause is dictated by the legislative authorization or mandate.

The relationship of clauses authorizing or mandating legislation to primary constitutional provisions has been the subject of two Montana Supreme Court decisions. On first review, the two cases seem to provide conflicting precedents. In *General Agriculture Corp. v. Moore*,¹⁶⁴ the Montana Supreme Court had to reconcile the apparently judicially enforceable rules of subsection (1) of the water rights provision of the 1972 constitution¹⁶⁵ with the command for supplementary legislation in subsection (4).¹⁶⁶ The court concluded that the mandate for implementing legislation in subsection (4) did not detract from the self-executing nature of subsection (1).¹⁶⁷ The court quoted at length from 16 C.J.S. *Constitutional Law* § 48:

The fact that a right granted by a constitutional provision may be better or further protected by supplementary legislation does not of itself prevent the provision in question from being self-executing; nor does the self-executing character of a constitutional provision necessarily preclude legislation for the better protection of the right secured, or legislation in furtherance of

163. "[T]he mere fact that legislation might supplement and add to or prescribe a penalty for the violation of a self-executing provision does not render such provision ineffective in the absence of such legislation." COOLEY *supra* note 64, at 170; GRAD, WORKING PAPERS, *supra* note 63, §2, at 18-19.

164. 166 Mont. 510, 534 P.2d 859 (1975).

165. "All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed." MONT. CONST. art. IX, § 3(1).

166. "The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records." MONT. CONST. art. IX, § 3(4).

167. *General Agric.*, 166 Mont. at 514-15, 534 P.2d at 862. Although the case seemingly was decided based simply upon the transition schedule and savings provisions adopted with the 1972 Constitution, the court made a point to address the relationship of the substantive terms in subsection (1) and the legislative mandate in subsection (4).

the purposes, or of the enforcement, of the provision.¹⁶⁸

Viewed according to the framework described above, the court concluded that the primary constitutional provision (subsection (1)) created an independent, judicially enforceable rule, and the clause commanding legislation (subsection (4)) was a mandate for supplementary rather than integral legislation.¹⁶⁹

Five years later the Montana Supreme Court seemed to reach a different conclusion when faced with a similar constitutional dilemma. The 1889 Montana Constitution provided in Article XVIII, Section 4, that a period of eight hours shall constitute a day's work in all industries and occupations except farming and stock raising. Section 5 provided that "[t]he legislature by appropriate legislation shall provide for the enforcement of the provisions of this article."

In *Weston v. State Highway Comm'n*,¹⁷⁰ the plaintiff sought overtime pay for work he performed for the State Highway Commission in excess of eight hour days, going back as far as the 1960s. The court responded to the plaintiff's reliance on the constitutional provision defining the work day as eight hours by noting that section 4 was not self-executing, but was instead dependent on legislative action under section 5.¹⁷¹ Since the legislature had not enacted legislation authorizing overtime pay for work in excess of eight hours, the constitutional provision did not entitle the plaintiff to relief.¹⁷² Again, analyzing the court's decision under the framework set out above, the court concluded that the primary constitutional clause (section 4) depended for its substance upon the legislation mandated under section 5, so that the legislative mandate was integral and not supplementary.¹⁷³ In such a case, the function of the primary clause is determined by the legislative mandate.

Are *General Agric. Corp.* and *Weston* as inconsistent as they appear? Unfortunately, *Weston* does not even acknowledge *General Agric. Corp.*, so we are left to speculate on the impact. It might be argued that the two cases are so similar with respect to the subsections at issue that *Weston* must constitute at least an implicit rejection of the analysis in *General Agric. Corp.* On the

168. *Id.* at 514, 534 P.2d at 862.

169. *Id.* at 515, 534 P.2d at 862.

170. 186 Mont. 46, 606 P.2d 150 (1980).

171. *Weston* 186 Mont. at 49-50, 606 P.2d at 152.

172. *Id.* at 50, 606 P.2d at 153.

173. *Id.* at 49-50, 606 P.2d at 152.

other hand, there are differences in the legislative mandates that might justify the different conclusions reached by the court.

The mandate to the legislature in *Weston* was to "provide for the enforcement of the provisions of this article."¹⁷⁴ The mandate to the legislature in *General Agric. Corp.* was to "provide for the administration, control, and regulation of water rights" and "establish a system of centralized records, in addition to the present system of local records."¹⁷⁵ It might be argued that the legislative mandate in *Weston* was not supplementary but integral, because the principle in Section 4 (in this case, the eight-hour work day) was meaningless until the legislature acted in some manner to provide substantive content, as well as means of enforcement. Section 4 on its own states merely that "[a] period of eight hours shall constitute a day's work"¹⁷⁶ It does not say that it shall be unlawful for an employer to cause a laborer to work more than eight hours, or that a laborer working more than eight hours shall be entitled to time-and-a-half wages. That is the type of substantive content deferred to the legislature by the mandate in Section 5. Upon reflection, it is evident why the court would find Section 4 wholly dependent on legislative action under Section 5. Without legislative action under Section 5, Section 4 could only be given meaning by the court exercising the authority granted to the legislature in Section 5 to establish rules for the enforcement of the principle expressed in Section 4.

In contrast to the legislative mandate to provide for "enforcement" in *Weston*, the legislative mandate in *General Agric. Corp.* was for "administration, control, and regulation."¹⁷⁷ Perhaps a mandate for "administration, control and regulation" is supplementary, while a mandate for "enforcement" is integral—thus justifying the different conclusions in *Weston* and *General Agric. Corp.*

The determination whether the legislative mandate is integral or supplementary seems to rest in a combination of the substantive provision and the precise legislative mandate. The relevant question is whether, in the absence of legislative action fulfilling the legislative mandate, the court may "enforce" the substantive constitutional provision without usurping authority expressly delegated to the legislature by the constitutional man-

174. MONT. CONST. art. XVIII, § 5 (1889).

175. MONT. CONST. art. IX, § 3(4).

176. MONT. CONST. art. XVIII, § 4 (1889).

177. MONT. CONST. art. IX, § 3(4).

date.

As stated above, the court's conclusion that the legislative mandate in *Weston* was integral seems correct, because a decision that the mandate was merely supplementary would have required the court to exercise discretion explicitly delegated to the legislature. The same analysis supports the court's conclusion that the legislative mandate is merely supplementary in *General Agric. Corp.* Even without legislative action providing "for the administration, control, and regulation of water rights,"¹⁷⁸ the court could enforce the constitutional standard that "[a]ll existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed."¹⁷⁹ While subsequent legislation may establish uniform procedures for confirming and regulating water rights, that legislation is not integral to enabling a court to "recognize and confirm" those rights. Further, a court may "recognize and confirm" those rights without in any way treading on territory explicitly delegated to the legislature.

7. Higher Principles

Some constitutional provisions express goals or public objectives designed to inform all those who may read the constitution of the values held by the citizens who adopted it.¹⁸⁰ Such provisions may also be adopted with the intent that the sentiments expressed therein will guide lawmakers and those charged with executing the laws in the exercise of their duties, and guide citizens in the conduct of their affairs. These provisions, however, do not create standards which may be judicially enforced.¹⁸¹

In *Helena Elementary School District v. Montana*,¹⁸² a group of plaintiffs challenged the constitutionality of the state's

178. MONT. CONST. art. IX, § 3(4).

179. MONT. CONST. art. IX, § 3(1).

180. The Montana Constitution yields few examples of clearly aspirational provisions. The only clause in the Montana Constitution which has been interpreted by the court to be aspirational is the first sentence of Article X, Section 1(1). See *infra* notes 182-88 and accompanying text. The Virginia Supreme Court has interpreted the environmental quality provision of Virginia's constitution (which declares that "it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources . . .") to be aspirational only. *Robb v. Shockoe Slip Found.*, 324 S.E.2d 674, 676 n.2 (Va. 1985).

181. *Id.* at 677. See also *Fernandez*, *supra* note 17, at 342; *Cooley*, *supra* note 64, at 165.

182. 236 Mont. 44, 769 P.2d 684 (1989).

method of funding public elementary and secondary education.¹⁸³ In defending its system, the state argued that the clause in the constitution that "[e]quality of educational opportunity is guaranteed to each person,"¹⁸⁴ is only an aspirational goal.¹⁸⁵ The court held that the plain meaning that equality of educational opportunity "is guaranteed" is clear and unambiguous and not aspirational.¹⁸⁶ By contrast, the court pointed to the immediately preceding clause as an example of a clearly aspirational provision: "It is the goal of the people to establish a system of education which will develop the full educational potential of each person."¹⁸⁷ The court emphasized the language, which characterized this sentiment as a "goal," in contrast to the "guarantee" of educational opportunity which established an enforceable standard.¹⁸⁸

However, to characterize these provisions as aspirational is not to say they are without meaning or importance. They may not establish legally enforceable standards, but they may serve to inform or guide other state action.¹⁸⁹ This concept is illustrated in a series of cases dealing with Montana's constitutional provisions concerning education.

In *State ex rel. Woodahl v. Straub*,¹⁹⁰ the state attorney general and department of revenue sought a declaratory judgment on the state law establishing a new taxing system for the support of public schools.¹⁹¹ Several counties in the state objected to the new system which required each county to levy a uniform tax on property, and then required each county to remit to the state any revenues raised in excess of the amount needed to fund the "foundation program" in that county.¹⁹² Those surplus funds would be combined with other state funds for allocation to counties whose uniform levy failed to generate revenue adequate to fund their foundation program.¹⁹³ Although the court ad-

183. *Helena Elementary*, 236 Mont. at 46, 769 P.2d at 685.

184. MONT. CONST. art. X, § 1(1).

185. *Helena Elementary*, 236 Mont. at 52, 769 P.2d at 689.

186. *Id.* at 52-53, 769 P.2d at 689.

187. *Id.* at 52, 769 P.2d at 689 (citing MONT. CONST. art. X, § 1(1)).

188. *Helena Elementary*, 236 Mont. at 53, 769 P.2d at 689.

189. "At the very least, the courts could use environmental provisions in state constitutions to resolve doubts created by ambiguous statutes and regulations in favor of the environmental values reflected in the provisions." Butler, *supra* note 15, at 855.

190. 164 Mont. 141, 520 P.2d 776 (1974).

191. *Woodahl*, 164 Mont. at 143, 520 P.2d at 777.

192. *Id.* at 143-45, 520 P.2d at 777-78.

193. *Id.*

ressed a number of arguments raised by opponents of the new taxing system, the legislative approach was upheld primarily by reference to the broad taxing powers authorized by the 1972 Constitution: "Taxes shall be levied by general laws for public purposes."¹⁹⁴ Since the law at issue required that all property in the state be levied on at the same rate, it was clearly a general law.¹⁹⁵ That left only the question whether taxes levied to support education were levied for a public purpose.¹⁹⁶ The answer to that question was found in the aspiration expressed in the constitution that the development of a quality system of education is a state goal, and thus an appropriate public purpose.¹⁹⁷

A dozen years later in *State ex rel. Bartmess v. Bd. of Trustees of School District No. 1*,¹⁹⁸ parents of students enrolled in two Helena high schools challenged the school district's rule excluding from extracurricular activities students whose grade averages fell below a "C."¹⁹⁹ The parents alleged the rule violated the equal protection and equal educational opportunity clauses of the Montana Constitution.²⁰⁰ They looked to the aspiration expressed in the constitution that the goal of the people is to establish a system of education "which will develop the full educational potential of each person."²⁰¹ Citing *McNair v. School District No. 1*,²⁰² the parents argued that physical and moral development, which are often central to high school extracurricular activities, are fundamental components of a public education, which may not be abridged except for a compelling state interest.²⁰³ The court looked to the same provision, but concluded in favor of the schools. A student's right to equal educational opportunity and equal protection was not violated by the district's rules.²⁰⁴

Our society tends to devalue provisions of law that are not enforceable through the judicial system.²⁰⁵ Self-execution analy-

194. MONT. CONST. art. VIII, § 1.

195. *Woodahl*, 164 Mont. at 148, 520 P.2d at 780.

196. *See id.*

197. *Id.*

198. 223 Mont. 269, 726 P.2d 801 (1986).

199. *Bartmess*, 223 Mont. at 271, 726 P.2d at 802.

200. *Id.*

201. *Id.* at 273, 726 P.2d at 803 (citing MONT. CONST. art. X, § 1(1)).

202. 87 Mont. 423, 288 P. 188 (1930). *See supra* notes 155-161 and accompanying text.

203. *Bartmess*, 223 Mont. at 272, 726 P.2d at 803.

204. *Id.* at 276, 726 P.2d at 805 (Turnage, C.J., concurring).

205. Dinah Bear, *The National Environmental Policy Act: Its Origins and Evo-*

sis reflects that attitude, by characterizing non-self-executing provisions as meaningless. However, aspirational provisions such as these are not without meaning. We would do well to acknowledge the potential significance of constitutional provisions that are not judicially enforceable. Constitutional provisions may express a moral and cultural imperative that is intended to serve a higher purpose. Legislators, agency personnel and individual citizens ought to heed the aspirations expressed in their state constitutions, even if their failure to do so does not subject them to legal recourse.²⁰⁶

IV. INTERPRETING MONTANA'S CONSTITUTIONAL ENVIRONMENTAL QUALITY PROVISIONS

A. *The Inalienable Right to a Clean and Healthful Environment*

Article II, Section 3 of Montana's 1972 Constitution lists inalienable rights possessed by all persons, including "the right to a clean and healthful environment."²⁰⁷ The inalienable right to a clean and healthful environment is a typical affirmative entitlement.²⁰⁸ As such, the substantive right exists by virtue of its expression in the constitution. Legislative action is not necessary to give substance to the right. At the same time, however, the clause poses several significant problems.

First, the clause raises significant questions of meaning. Although the words "clean" and "healthful" are not really unclear or ambiguous, they are vague. The Constitution itself yields no insight into the meaning of these terms. The history from the

lutions, NAT. RESOURCES & ENV'T, Fall 1995, at 3, 72.

206. "If a value has constitutional stature, it should affect the decisions of conscientious regulators and gradually influence public opinion in its favor." Butler, *supra* note 15, at 857-58.

207. Article 4, Section 3 provides:

SECTION 3. INALIENABLE RIGHTS. All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

MONT. CONST. art. II, § 3.

208. See *supra* notes 122-127 and accompanying text. The Montana Supreme Court characterizes rights found in the constitution's Declaration of Rights as "fundamental rights." See *Wadsworth v. State*, ___ Mont. ___, 911 P.2d 1165, 1172 (1996). When the government intrudes upon a fundamental right, the government must show a compelling state interest for the intrusion, and the intrusion must be the least onerous that can be taken to achieve the state objective. *Id.* at ___, 911 P.2d at 1174.

Constitutional Convention sheds little light on the drafters' intent. It is clear that the drafters intended to give substance to the right by the addition of the adjectives "clean" and "healthful."²⁰⁹ However, the transcripts provide no insight into the substantive content of the terms. Common sense tells us that "clean" and "healthful" are relative terms, yet the Constitution does not define the right as entitling persons to the "cleanest and healthiest" environment possible.

Second, the clause is silent as to enforcement and remedies. Perhaps the clause may be read as establishing an implicit limit on government action; that is, it could be applied as if it read: "The state shall make no law impairing the right of each person to a clean and healthful environment."²¹⁰ As such, any law could be challenged as exceeding the constitutional limit, and those found to exceed the limit would be struck down as unconstitutional. So construed, the provision would serve as a limit only on legislative action.

But is the right enforceable only against the legislature, or is it also enforceable against other government officials, and perhaps even also against private parties? Is a violation subject to injunctive relief, and is a party whose right is violated entitled to damages? If my neighbor is burning leaves may I sue for damages premised upon the violation of my constitutional right to a clean and healthful environment?

These examples should suffice to suggest the multitude of *Bivens* and related issues raised by this affirmative right. It is hardly surprising that courts faced with similar provisions have sought refuge in a determination that such clauses are non-self-executing.²¹¹ Further, proponents of such clauses need to appreciate the risks such vague terms invite. The case history in Pennsylvania involving the Gettysburg Battlefield typifies winning the battle, but losing the war, in constitutional environmental interpretation.²¹²

In *Commonwealth of Pennsylvania v. National Gettysburg Battlefield Tower, Inc.*,²¹³ Pennsylvania sought to enjoin construction of an observation tower overlooking the historic Gettys-

209. See V TRANSCRIPTS *supra* note 48, at 1637-38.

210. See, e.g., *National Gettysburg Battlefield Tower*, 311 A.2d at 592.

211. See *Robb*, 324 S.E.2d 674 at 677; *National Gettysburg Battlefield Tower*, 311 A.2d at 593.

212. See *National Gettysburg Battlefield Tower*, 311 A.2d at 588; see also *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973).

213. 311 A.2d 588 (Pa. 1973).

burg battlefield. The Commonwealth based its suit on Article I, Section 27 of the Pennsylvania Constitution, which had been ratified by the voters of Pennsylvania two years earlier.²¹⁴ A plurality of the Pennsylvania Supreme Court believed that the provision was not self-executing.²¹⁵ Their conclusion was founded largely upon the multitude of unresolved questions raised by the vague terms of the provision, which in their view required legislative attention.²¹⁶

Later that same year, the Commonwealth Court was asked to enjoin a street widening project because, among other things, the project would violate Article I, Section 27 of the Pennsylvania Constitution.²¹⁷ Because the Pennsylvania Supreme Court did not have a majority concurring that the section is not self-executing, the Commonwealth Court maintained its earlier position that the section is self-executing.²¹⁸ Although the Commonwealth Court held Article I, Section 27 to be self-executing, it identified the need for realistic balancing of environmental and social concerns.²¹⁹ The Commonwealth Court propounded a three-part test for review of decisions under Article I, Section 27:

214. The Pennsylvania Constitution provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PENN. CONST. art. I, § 27.

215. *National Gettysburg Battlefield Tower*, 311 A.2d at 593.

216. In *National Gettysburg Battlefield Tower*, the court stated:

It is not for [the governor] alone to determine when the 'natural, scenic, historic, and esthetic values of the environment' are sufficiently threatened as to justify the bringing of an action. After all, 'clean air,' 'pure water,' and 'the natural, scenic, historic and esthetic values of the environment,' have not been defined. The first two, 'clean air' and 'pure water,' require technical definitions, since they depend, to some extent, on the technological state of the science of purification

If we were to sustain the Commonwealth's position that the amendment was self-executing, a property owner would not know and would have no way, short of expensive litigation, of finding out what he could do with his property. . . .

We do not believe that the framers of the environmental protection amendment could have intended such an unjust result, one which raises such serious questions under both the equal protection clause and the due process clause of the United States Constitution.

311 A.2d at 593.

217. *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973).

218. *Id.* at 94.

219. *Id.*

(1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?²²⁰

Applying this test to the decision being challenged, the court concluded that the plaintiffs' complaint should be dismissed.²²¹

In this instance, a victory for self-execution may be a lost opportunity. The Commonwealth Court's test for applying the Pennsylvania constitutional environmental quality provision may yield merely marginal benefits beyond Pennsylvania statutory law. The court's interpretation (or at least its application) strips the provision of much substantive impact.

The difficult questions of interpretation, application and enforcement all counsel for judicial restraint in applying the right to a clean and healthful environment. With that caveat, the right exists by virtue of its expression in the Constitution and government officials and private citizens have a legal obligation to respect that right to the best of their ability, even if their failure to do so does not subject them to legal action.²²² Further, the right expressed in the Constitution may inform and guide other government actions.²²³

B. The Obligation of the State and Each Person to Maintain and Improve a Clean and Healthful Environment

Except for the inalienable rights provision just discussed, all of the environmental quality provisions appear in Article IX, which is devoted to the environment and natural resources.²²⁴ Section 1 of Article IX consists of three subsections:

220. *Id.*

221. *Id.*

222. See *supra* notes 135-136 and accompanying text.

223. For example, although the environmental rights provision in the Pennsylvania Constitution was held not to be self-executing, it has been held to justify historic preservation as a legitimate exercise of governmental regulatory authority. See *United Artists' Theater Circuit v. City of Philadelphia*, 635 A.2d 612, 620 (Pa. 1993); *In re Gaster*, 556 A.2d 473, 477 (Pa. Commw. Ct. 1989).

224. See the description of all the Article IX provisions *supra* notes 59-60 and accompanying text.

SECTION 1. PROTECTION AND IMPROVEMENT. (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.

(2) The legislature shall provide for the administration and enforcement of this duty.

(3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

Subsections (1) and (2) clearly relate to each other; note that the antecedent of "this duty" is that which is described in subsection (1). Further, subsections (1) and (2) are independent of subsection (3).

The initial task in interpreting subsections (1) and (2) is determining whether the legislative mandate in subsection (2) is integral or supplementary to subsection (1).²²⁵ In other words, does the substantive principle that "[t]he state and each person shall maintain and improve a clean and healthful environment" have meaning independent of legislative action pursuant to subsection (2) to "provide for the administration and enforcement of this duty"?

The explicit legislative mandate seems to combine the mandates addressed in *Weston v. Montana State Highway Comm'n*²²⁶ and *General Agric. Corp. v. Moore*²²⁷ Like the mandate in *Weston*, the mandate here calls on the legislature to provide for the "enforcement" of this duty. Like the mandate in *General Agric. Corp.*, the mandate in this section calls on the legislature to provide for "administration" of the duty. Although "administration" seems to be the language of supplementary mandate, "enforcement" is the language of an integral mandate.

An initial question then is whether a court may enforce the substantive principles set forth in subsection (1), in the absence of legislation responding to the legislative mandate in subsection (2), without usurping authority explicitly delegated to the legislature. The answer in this case is that an effort by a court to enforce the terms of subsection (1) clearly will usurp authority explicitly delegated to the legislature. The constitution provides no principles on which a court may answer the critical questions of

225. See *supra* notes 141-179 and accompanying text.

226. 186 Mont. 46, 606 P.2d 150.

227. 166 Mont. 510, 534 P. 2d 859.

what constitutes a "clean" environment, a "healthful" environment, or what comprises the obligation to "improve" such an environment.²²⁸ Even those who urge the courts to accept the challenge to enforce this obligation without legislation, admit a court would have to define these terms and establish the extent of these obligations. But, those are precisely the tasks reserved to the legislature by subsection (2). The legislative mandate in subsection (2) is integral, and respect for the separation of powers obligates the courts to refrain from implementing the terms of subsection (1) until the legislature acts.

Does this mean that subsection (1) is entirely without any meaning or import until the legislature acts? Even without legislative implementation under subsection (2), subsection (1) serves as a statement of higher principles which may inform and guide state agencies and the judiciary.²²⁹ Indeed, the Montana Supreme Court has looked to both the inalienable rights provision and the higher principles in Article IX, Section 1(1) to legitimize the state interest in environmental quality.

In two cases in 1977, the Montana Supreme Court looked to the environmental quality provisions in the constitution to support environmental concerns as legitimate public purposes warranting the exercise of the state's police powers.²³⁰ In *State v. Bernhard*, the defendant challenged his conviction for operating a motor vehicle wrecking facility without a license.²³¹ Among his defenses, Mr. Bernhard, who appeared *pro se*, seemed to argue that the law's requirement that four or more junk vehicles be shielded from public view was an unsupported exercise of the police power.²³² Citing precedent from Washington, Oregon, Florida and Wisconsin, the court had no trouble holding that aesthetic considerations may support an exercise of the police

228. The Montana Constitution poses a special dilemma because the same terms "clean" and "healthful" appear both in the inalienable rights provision in art. II, § 3 and in art. IX, § 1(1). This fact, however, further counsels for judicial restraint in dealing with the inalienable rights provision. Since art. IX, § 1(2) expressly delegates the task of providing for the "administration and enforcement" of the obligation in § 1(1) to the legislature, it is the legislature which the constitution contemplates must define the terms "clean" and "healthful." By exercising judicial restraint in dealing with art. II, § 3, the courts are respecting the constitutional mandate which defers to the legislature the definition of these crucial terms.

229. See discussion *supra* notes 205-206 and accompanying text.

230. *State v. Bernhard*, 173 Mont. 464, 568 P.2d 136 (1977); *Douglas v. Judge*, 174 Mont. 32, 568 P.2d 530 (1977).

231. *Bernhard*, 173 Mont. at 466, 568 P.2d at 137.

232. *Id.* at 467, 568 P.2d at 138.

power.²³³ As further support for the proposition that a legislative purpose to preserve or enhance aesthetic values is a sufficient basis for the state's exercise of its police power, the court cited the Article II, Section 3 right of Montana citizens to a "clean and healthful environment."²³⁴

Later that same term, the court in *Douglas v. Judge* turned to the constitutional environmental provisions to support legislation that provided for renewable resource development loans to farmers and ranchers.²³⁵ Ms. Douglas alleged that to the extent the legislation authorized renewable resource development loans to private farmers and ranchers, it constituted a levy of taxes for other than a "public purpose."²³⁶ The court held that in light of the constitutional mandate that: "The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations," the legislative purpose to provide for the development of renewable resources was a public purpose.²³⁷

Thus, Article IX, Section 1(1), although not establishing a judicially enforceable principle without implementing legislation pursuant to subsection (2), serves to inform and guide state actions and expresses an aspiration which, though not judicially enforceable, ought to guide the state and each person in the conduct of their affairs. Such a principle, while not self-executing in traditional terms, is certainly not without meaning or force.

C. The Legislature's Obligation to Protect the Environmental Life Support System from Degradation and Prevent Unreasonable Depletion and Degradation of Natural Resources

Subsection (3) of Article IX, Section 1 is clearly independent of the legislative mandate in subsection (2) and the substantive terms of subsection (1): "(3) The legislature shall provide adequate remedies for the protection of the environmental life sup-

233. *Id.*

234. *Id.* The court reiterated this position a decade later when it again upheld the law requiring shielding of junk vehicles. *State v. Green*, 227 Mont. 299, 739 P.2d 469 (1987).

235. *Douglas*, 174 Mont. at 35-36, 568 P.2d at 532-33.

236. *Id.* at 35, 568 P.2d at 532.

237. *Id.* at 35-36, 568 P.2d at 532-33. Although the legislation withstood the "public purpose" challenge to its constitutionality, the court declared unconstitutional those portions of the law which provided for renewable resource development loans to farmers and ranchers as an unlawful delegation of legislative power to the Department of Natural Resources and Conservation. *Id.* at 40, 568 P.2d at 535.

port system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." Although expressing lofty sentiments, this clause is not an aspirational provision, exclaiming public policy objectives.²³⁸ Nor is this provision an explicit rule, comparable to legislation.²³⁹ Instead, this clause is a straightforward mandate to the legislature.²⁴⁰

The clause is not addressed to the people of the state nor to the courts; it is explicitly directed to the legislature. The clause orders the legislature to "provide adequate remedies" to protect the environmental life support system from degradation and to prevent unreasonable depletion and degradation of natural resources. Like all legislative mandates in the constitution, respect for the constitutional principle of separation of powers restricts judicial enforcement of the obligation.²⁴¹ Just as the constitutional mandate that the legislature is to limit municipal indebtedness²⁴² lies inchoate until the legislature responds by enacting limits on municipal debts,²⁴³ so too does this mandate for environmental protection.

As noted previously, although deference to the principle of separation of powers may restrict a court from ordering the legislature to act in the first instance, it does not strip a constitutional command to the legislature of all meaning.²⁴⁴ As illustrated in *Butte Community Union*,²⁴⁵ constitutional legislative mandates establish parameters which must be respected by the legislature when legislation is enacted. The question then becomes what limit on legislation is established by Article IX, Section 1(3).

This subsection imposes two distinct obligations on the legislature: (1) to provide adequate remedies for the protection of the environmental life support system from degradation, and (2) to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources. Employing the theory underlying *Butte Community Union*,²⁴⁶ the constitutionality of

238. See *supra* notes 180-81 and accompanying text.

239. See *supra* notes 105-07 and accompanying text.

240. See *supra* note 71 and accompanying text.

241. See *supra* notes 72-74 and accompanying text.

242. MONT. CONST. art. XIII, § 5.

243. See *supra* notes 70-73 and accompanying text.

244. See *supra* notes 144-61 and accompanying text.

245. 229 Mont. 212, 745 P.2d 1128 (1987); see *supra* notes 145-54 and accompanying text.

246. See *supra* notes 145-54 and accompanying text.

a relevant legislative act may be tested against the standard established by this subsection.²⁴⁷

Looking first to the language of the clauses themselves,²⁴⁸ a few points are clear. The instruction to the legislature in each instance is "to provide adequate remedies," as opposed to an outright command that the legislature shall "protect the environmental life support system from degradation" and "prevent unreasonable depletion and degradation of natural resources." As a result, the constitutional standard against which relevant legislation would be judged is whether the legislation "provides adequate remedies." The language of the subsection is also noteworthy for the dual degradation policy it espouses: environmental life support systems are to be protected from all degradation, while natural resources are to be protected from "unreasonable" depletion and degradation. The drafters of the provision acknowledged that some nonrenewable natural resources are to be consumed, and this provision "permits the Legislature to determine whether the resources [are] being unreasonably depleted."²⁴⁹ Finally, the language is noteworthy for some of the specific word choices. The drafters of the language intentionally avoided defining any of the terms of the provision.²⁵⁰ They stated, however, that the term "environmental life support system" is "all encompassing, including but not limited to air, water and land."²⁵¹ The drafters also stated that, whatever might ultimately be the legislative and judicial parameters placed on the definition of "environmental life support system," "... [that system] cannot be degraded,"²⁵² without, however, defining "degradation."

It is against this background that the constitutionality of specific legislation would be judged. By its own terms, the constitutional mandate is for "adequate remedies." To overturn legislation, the court must find that the legislature's judgment that specified remedies were "adequate" is in error. In some cases such a determination may be appropriate, but deference to the legislature suggests that courts judiciously exercise such judgment. Moreover, the absence of a standard for judging "degradation" is problematic. The drafters of the provision clearly intend-

247. See *supra* notes 145-54 and accompanying text.

248. See *supra* notes 57-60 and accompanying text.

249. IV TRANSCRIPTS, *supra* note 48, at 1201 (alteration in original).

250. IV TRANSCRIPTS, *supra* note 48, at 1201 (statement of Delegate McNeil).

251. *Id.*

252. *Id.*

ed that the environmental life support system "cannot be degraded,"²⁵³ but neither their language nor their deliberations answer the question of what constitutes degradation. Environmental quality legislation for the past twenty years has struggled to define what separates acceptable from unacceptable changes in environmental quality.²⁵⁴

"Degradation" in the environmental quality context is susceptible of numerous interpretations. For example, in the water quality context, is degradation only triggered by a change in water quality which adversely affects human health or the ability of the water body to support biotic organisms? Or is degradation only triggered by a change in water quality which actually precludes (or interferes with?) existing (or potential) beneficial uses of the water body?

These brief examples are adequate to reflect the integral, rather than supplementary, nature of the legislative mandate in subsection (3) of Article IX, Section 1. Questions of what constitutes unacceptable alterations to the physical environment ("degradation") are expressly delegated to the legislature in subsection (3).

D. Reclamation of Lands Disturbed by the Taking of Natural Resources.

The final environmental quality provision in the constitution is Article IX, Section 2(1): "SECTION 2. RECLAMATION. (1) All lands disturbed by the taking of natural resources shall be reclaimed. The legislature shall provide effective requirements and standards for the reclamation of lands disturbed." This subsection poses the same initial dilemma as subsections (1) and (2) of Section 1.²⁵⁵ Are the substantive provision of the first sentence and the legislative mandate in the second sentence so inextricably intertwined that the entire provision is a legislative mandate, unenforceable in the first instance and with significance, if at all, only as a limit on legislative action once taken? Or, are the two sentences independent, with the second sentence authorizing or commanding supplementary legislation, which does not detract from the meaning or enforceability of the principle set

253. IV TRANSCRIPTS, *supra* note 48, at 1202.

254. See 1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER, § 3.7, at 245-46 (1986 & Supp. Fall 1995); WILLIAM F. RODGERS, JR., ENVIRONMENTAL LAW, § 4.1, at 261-62 (2d ed. 1994 & Supp. 1995).

255. See *supra* note 226 and accompanying text.

forth in the first sentence? The language of the legislative mandate itself differs from that at issue in *Weston*²⁵⁶ and in *General Agric. Corp.*²⁵⁷ Whereas the constitutional clause at issue in *Weston* called on the legislature to provide for the "enforcement" of the principle that eight hours constituted a full day's work,²⁵⁸ and the constitutional clause at issue in *General Agric. Corp.* called on the legislature to provide for the "administration, control, and regulation" of water rights,²⁵⁹ the command to the legislature in subsection (1) of Section 2 is to "provide effective requirements and standards for the reclamation of lands disturbed."²⁶⁰ Are the requirements and standards for reclamation integral or supplementary to the obligation to reclaim lands disturbed by the taking of natural resources?

The answer to this question may be found by asking whether a court may implement the substantive principle set forth in the first sentence, in the absence of legislation responding to the legislative mandate in the second sentence, without usurping authority explicitly delegated to the legislature. As discussed regarding subsections (1) and (2) of Section 1 of Article IX,²⁶¹ an effort by a court to enforce the terms of the first sentence of subsection (1) of Section 2 of Article IX will impinge on authority explicitly delegated to the legislature. As anyone familiar with mining or forestry will attest, "reclamation" is not a singular concept. The general principle of reclamation as opposed to no reclamation may be clear, but there are infinite gradations of reclamation itself.²⁶² The constitution itself provides no principles on which a court may answer the critical questions of what degree of reclamation is required and against what standards the reclamation is to be judged. Indeed, it is precisely the defini-

256. *Weston v. Montana State Highway Comm'n*, 186 Mont. 46, 606 P.2d 150 (1980); see *supra* notes 170-79 and accompanying text for a thorough discussion of the case.

257. *General Agric. Corp. v. Moore*, 166 Mont. 510, 534 P.2d 859 (1975); see *supra* notes 164-69 and accompanying text for a thorough discussion of the case.

258. *Weston*, 186 Mont. at 49-50, 606 P.2d at 152 (discussing MONT. CONST. art. XVIII, § 5 (1889)).

259. *General Agric. Corp.*, 166 Mont. at 514-15, 534 P.2d at 862 (discussing MONT. CONST. art. IX, § 3, cl. 4).

260. MONT. CONST. art. IX, § 2, cl. 1.

261. See *supra* note 242 and accompanying text.

262. See Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1234 (1994) (stating that inadequately reclaimed mines are eligible for funding); H.R. REP. NO. 218, 95th Cong., 1st Sess. (1977), reprinted in 1977 U.S.C.C.A.N. 593 (noting that SMCRA was intended to address the huge cost to taxpayers of poorly reclaimed coal mines).

tion of those essential terms which is assigned to the legislature by the second sentence. Any effort by the court to enforce the obligation to reclaim requires the court to substitute its judgment for that of the elected legislature as to requirements and standards for reclamation. The legislative mandate in the second sentence is integral, and respect for the separation of powers obligates the courts to refrain from enforcing the obligation to reclaim until the legislature acts to provide substance to the obligation.

Once again, a finding that the legislative mandate is integral does not strip the substantive constitutional provision of all meaning.²⁶³ A court may strike down a legislative act as violative of or incompatible with the constitutional mandate. A recent Montana District Court case provides an example involving subsection (1) of Section 2 of Article IX.²⁶⁴ In *National Wildlife Federation* the plaintiff challenged the amendment of a mine permit, alleging that the Montana mine reclamation statute violated the state constitution because it exempted open pit mines from reclamation.²⁶⁵ Judge Honzel held the statute violated the constitutional requirement for reclamation to the extent it exempted an entire category of mining.²⁶⁶

The case illustrates the appropriate limit of judicial authority under a constitutional provision such as Article IX, Section 2(1). A court may review a legislative act in light of a constitutional provision, even a provision dependent for direct enforcement on an integral legislative mandate. To the extent that the legislative act fails to comport with the unambiguous constitutional principle, the court may strike down the legislative act, while respecting the separation of powers. As *National Wildlife Federation* illustrates, the court may, without usurping legislative prerogatives expressed in the constitution, strike as unconstitutional a legislative act which exempts lands disturbed by open pit mining from the obligation to reclaim. The constitutional principle is that "all lands disturbed by the taking of natural resources shall be reclaimed."²⁶⁷ A legislative act which exempts an entire category of lands clearly violates the constitutional principle.

263. See *supra* note 144-61 and accompanying text.

264. *National Wildlife Fed'n v. Montana Dep't of State Lands*, No. CDV-92-486 (1st Dist. Mont. Sept. 1, 1994).

265. *Id.* at 46.

266. *Id.*

267. MONT. CONST. art. IX, § 2, cl. 1.

Such an action, however, differs significantly from an action challenging actual reclamation standards adopted by the legislature. The constitution has delegated the task of establishing effective reclamation requirements and standards to the legislature, and legislative determinations in those respects will be entitled to substantial deference.²⁶⁸

V. CONCLUSION

I suspect the conclusions in this Article will disappoint the environmentalists among the readership and perhaps gratify those who advocate for resource development. Those reactions are unjustified.

Although this Article concludes that Montana's constitutional environmental quality provisions provide little by way of judicially enforceable obligations, it urges an appreciation for the broader significance of constitutional provisions. We need to reaffirm that the meaning of a constitutional provision is not limited by its judicial enforceability.

If nothing else, I hope this Article engenders an appreciation for the complex issues posed by the interpretation and application of Montana's constitutional environmental quality provisions. That appreciation ought to be shared by those who draft and promote constitutional language, by those who seek to invoke constitutional provisions to advance their interests, by the courts who are implored to enforce constitutional rights and obligations, and by public officials (elected, appointed and hired) who pledge to respect and uphold the constitution of the state.

In particular, public servants—elected and appointed—must embrace their sacred promise to uphold the constitution of the state. Legislators must respect the sentiments and guidance of the state's citizens as expressed in the constitution. They must not act in clear disregard of constitutional strictures. Their oath is not that they will uphold the constitution only insofar as it may be judicially enforced. While legislators acting in disregard of the constitution may not be legally accountable, it is up to the citizens of the state to hold them politically accountable.

If each of us, in our role as citizens, accepts the obligations and responsibilities imposed on us by the constitution, the issue

268. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 563 (1990) (citing *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) for the proposition that the Court must defer to legislation responding to a constitutional charge to provide for the general welfare).

of judicial enforceability of constitutional provisions would be of little account. That is, perhaps, too much to ask. But, it seems to me, it is at the heart of what a state constitution ought to be.